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CIVIL DOCKET
UNITED STATES DISTRICT COURT

CIV-67-63-W

Jury demand date:

TITLE OF CASE	ATTORNEYS
UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, JAMES M. DAMON, JOHN E. MORBY and ZIGMUNT W. SMIGAJ, JR. VS. LESTER GUNN, Sheriff of Bell County, Texas, A. M. TURLAND, Justice of the Peace, Bell County, Texas, Precinct No. ——, and JOHN T. COX, County Attorney, Bell County, Texas Suit to declare Art. 474 of Vernon's Texas Penal Code null and Void and in violation of the U. S. Constitution and for the appointment of a Three-Judge Court to hear same and for a temporary and permanent injunction against defendants from prosecuting these plaintiffs under the said Article 474.	For plaintiff: Sam Houston Clinton, Jr. 205 Texas AFL-CIO Building 308 West 11th Street Austin, Texas 78701 For defendant: John T. Cox, County Attorney Belton, Texas For defendants: Crawford C. Martin, Attorney General of Texas R. L. Lattimore, Assistant Attorney General Howard M. Fender, Assistant Attorney General (active counsel) Box R, Capitol Station, Austin, Texas 78711

CIV-67-63-W

DATE	PROCEEDINGS—	Date Order or Judgment Noted
1967		
Dec. 21	1—Complaint, filed	1
Dec. 21	2—Motion for Temporary Restraining Order and Affidavit in Support of Same, filed	10
Dec. 21	3—Temporary Restraining Order, filed and entered (signed: 12/20/67) Microfilmed Reel No. 20	14
Dec. 21	4—Bond as Required in Temporary Restraining Order, filed (Approved by the Court on Dec. 20, 1967.)	16
Dec. 21	5—Motion for Preliminary Injunction, Memorandum in Support of Motion for Preliminary Injunction and Affidavit in Support of Motion for Immediate Convening of Three-Judge Federal District Court Pursuant to Title 28 USC 2281 and 2284	18
Dec. 21	Summons issued for all three defendants and delivered to Marshal in Waco	
Dec. 22	Writ to Serve Certified Copies of Temporary Restraining Order and the Bond Required in said Order, on all three defendants, issued and delivered to the Marshal in Waco	
1968		
Jan. 2	6—Stipulation to Extend Time of the Temporary Restraining Order, heretofore entered, filed	24
Jan. 2	7—Order Continuing Temporary Restraining Order, filed and entered (signed: 12/29/67) Microfilmed Reel No. 22	25
Jan. 4	8—Summons rtd & filed: Ex. 12/22/67 serving Lester Gunn, Belton, Texas, A. M. Turland, Killeen, Texas, and John T. Cox, Temple, Texas. By Robt. G. Brooks, DUSM	26
Jan. 4	9—Writ to Serve Copy of Temporary Restraining Order and Bond, rtd. & filed: Ex. 12/22/67 serving Lester Gunn, Belton, A. M. Turland, Killeen and John T. Cox, Temple, Texas. By Robert G. Brooks, DUSM.	27

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. 67-63-W

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, JAMES M. DAMON, JOHN E. MORBY and ZIGMUNT W. SMIGAJ, JR.,

Plaintiffs,

v.

LESTER GUNN, Sheriff of Bell County, Texas; A. M. TURLAND, Justice of the Peace, Bell County, Texas, Precinct No. ____; JOHN T. COX, County Attorney, Bell County, Texas,

Defendants.

COMPLAINT

Plaintiffs, for their verified complaint, allege as follows:

1.

Parties

A. Plaintiffs

1. UNIVERSITY COMMITTEE TO END THE WAR in VIET NAM (UNIVERSITY COMMITTEE) is an unincorporated voluntary association composed of young men and women who are residents of Austin, Travis County, Texas, and its environs; it is a recognized and approved organization operating on the campus of the University of Texas at Austin, Travis County, Texas, subject to applicable rules and regulations promulgated by the University of Texas at Austin; its purpose is to reach out to thousands of Texans and, with similar organizations, to millions of Americans deeply troubled by the war in Viet Nam, by means of discussions, debates, forums, educational

programs, publications, demonstrations and non-violent direct action—all in an attempt to bring the war in Viet Nam to a quick, non-military end.

2. JAMES M. DAMON and JOHN E. MORBY are citizens of the United States, residents of the State of Texas and members of the UNIVERSITY COMMITTEE. Each brings this cause of action for himself and all members of the COMMITTEE.

3. ZIGMUNT W. SMIGAJ, JR., is a citizen of the United States and a resident of Austin, Travis County, Texas, and although not a formal member of the UNIVERSITY COMMITTEE is sympathetic to its purposes and undertakings and a participant in its affairs. He sues on behalf of himself as well as all other persons in Austin, Travis County, and its environs, similarly situated, which is a class of persons too numerous to bring before the Court.

4. The classes above described are so numerous that joinder of all of their members herein is impracticable. There are questions of law and of fact common to each class, the claims of the named Plaintiffs are typical of the claims of each class; and the named Plaintiffs will fairly and adequately protect the interests of each class.

B. Defendants

5. Defendant LESTER GUNN is a citizen of the United States and of the State of Texas and is the duly elected and serving Sheriff of Bell County, Texas. He is sued individually and in his official capacity, and also as a representative of the class of deputy sheriffs of Bell County, Texas, serving and acting under his supervision and control, which class is too numerous to bring before the Court and the names of

the members of which are presently unknown to Plaintiffs.

6. Defendant A. M. TURLAND is a citizen of the United States and of the State of Texas and is the duly elected and serving Justice of the Peace, Bell County, Texas, Precinct No. ____. He is sued individually and in his official capacity.

7. Defendant JOHN T. COX is a citizen of the United States and of the State of Texas and is the duly elected and serving County Attorney of Bell County, Texas. He is sued individually and in his official capacity.

8. Each Defendant is sued individually and in his official capacity. Injunctive relief is sought against each as well as his agents, employees, and all persons acting in concert or cooperation with him.

2.

Jurisdiction

9. The jurisdiction of the Court over the complaint arises under 28 U.S.C. 1331 (a), 1343 (3) (4), 2201, 2202, 2281 and 2284; 42 U.S.C. 1981, 1983 and 1985; and under the Constitution of the United States, more particularly the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments thereto.

10. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of Ten Thousand Dollars ($10,000).

3.

The Cause of Action

11. The Defendants herein, or some of them, under color of certain statutes of the State of Texas, have entered into a plan or scheme of concerted and

joint action with other persons to the Plaintiffs unknown to subject and cause to be subjected the Plaintiffs, citizens of the United States, to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States.

12. Pursuant to this plan or scheme, the Defendants, or some of them, have attempted to and threatened to continue to attempt to prosecute the individual Plaintiffs and persons associated with them or the UNIVERSITY COMMITTEE under the color of a certain State statute, namely Article 474, Vernon's Texas Penal Code, which is set forth in Appendix "A" hereto, and by reference incorporated herein.

13. Defendant GUNN, or deputy sheriffs and other law enforcement officers acting under his supervision and control, without any basis whatsoever in law or fact attempted to institute the prosecution of Plaintiffs and other persons associated with them and the UNIVERSITY COMMITTEE or working in cooperation with them by arresting them without a warrant and thereafter alleging that Plaintiffs had violated the aforementioned statute.

14. The Defendant TURLAND, without any basis whatsoever in law or fact, upon the instigation of Defendant GUNN, or deputy sheriffs and other law enforcement officers acting under his supervision and control, ordered each Plaintiff held on said charges of an offense for which is prescribed a maximum fine of $200, subject to bail set by him in the amount of $500 each.

15. Defendant COX is charged by law with the prosecution of said charges upon which trial of Plaintiffs is pending.

16. Specifically, on the 12th day of December, 1967,

upon learning that the President of the United States was scheduled to appear and speak at a ceremony of dedication of Central Texas College near Killeen, Bell County, Texas, individual Plaintiffs and others went to the site of that ceremony intending to carry out the purposes of the UNIVERSITY COMMITTEE by engaging in a peaceful demonstration through the use of placards and signs bearing appropriate slogans and statements pertaining to the war in Viet Nam. As they approached the assembled crowd with their placards and signs and before they had uttered a single word, they were accosted and attacked by persons on the edge of the crowd who tore and destroyed the placards and signs and otherwise assaulted individual Plaintiffs and their associates. Defendant GUNN, or deputy sheriffs and other law enforcement officers acting under his supervision and control, promptly seized individual Plaintiffs, forceably propelled to motor vehicles, handcuffed and transported individual Plaintiffs to the Killeen City Jail where they were searched, Plaintiff MORBY was disrobed, and all were confined. Later, individual Plaintiffs were taken before Defendant TURLAND, charged with "disturbing the peace" and told by Defendant TURLAND that bail was set at $500 (notwithstanding a statutorily prescribed maximum fine of $200) and thereafter returned to the Killeen City Jail where they were booked, fingerprinted and photographed and confined to cells until they were transferred to Belton, Bell County, Texas, where they were again confined to cells until released on bond in the amount of $500 each.

17. Article 474, Vernon's Texas Penal Code, is void and illegal on its face and as applied to Plaintiffs herein in that it violates the Constitution of the United States and in particular the First, Fourth, Fifth,

Sixth, Eighth, Ninth and Fourteenth Amendments thereto. This statute violates the fundamental guarantees of free speech, press, assembly and the right to petition the Government for redress of grievances. It violates the guarantee of due process of law in that it is vague and indefinite and fails to meet the requirement of certainty in criminal statutes. Similar statutes and ordinances have already been held unconstitutional on their face by other Federal courts, including the Supreme Court of the United States. (See, e.g., *Wright v. Georgia,* 373 U.S. 284 (1963), and *Carmichael v. Allen,* —— F. Supp. —— (U.S.D.C. N.D. Ga., 1966).

18. Pursuant to the aforesaid plan or scheme the Defendants, or some of them, have threatened and continued to threaten to enforce the said unconstitutional, void and illegal state statute against the Plaintiffs herein.

19. Pursuant to the aforesaid plan or scheme Defendants, or some of them, have threatened and continued to threaten to enforce the said unconstitutional, void and illegal state statute against Plaintiffs herein for the sole purpose of harassing, intimidating, subjecting and causing to be subjected Plaintiffs and members of the UNIVERSITY COMMITTEE and its friends and supporters to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States, particularly those guaranteed by the First Amendment.

20. Plaintiffs and members of the UNIVERSITY COMMITTEE and its friends and supporters have been attempting through peaceful and non-violent means to carry out the purposes and objectives of the COMMITTEE. These purposes and objectives are spe-

cifically protected and guaranteed by the Constitution of the United States and more particularly the First and Fourteenth Amendments thereto. In their constant efforts to achieve these constitutionally protected purposes and rights and efforts Plaintiffs and members of the COMMITTEE and its friends and supporters were and have been attempting to exercise rights guaranteed under the First and Fourteenth Amendments of the Constitution to freedom of speech, press, assembly and association and the right to assemble, associate and petition for a redress of grievances.

4.

Equity

21. Unless restrained by order of this Court Defendant COX will prosecute or cause to be prosecuted Plaintiffs herein before Defendant TURLAND with the assistance of Defendant GUNN, or the deputy sheriffs and other law enforcement officers acting under his supervision and control. The sole purpose, intention and effect of threatening to enforce said statute by such prosecution is to deter, intimidate, hinder and prevent Plaintiffs and members of the UNIVERSITY COMMITTEE and its friends and supporters from exercising their constitutional rights guaranteed under the First and Fourteenth Amendments in their efforts to carry out the objectives and purposes of the COMMITTEE. Prosecution of Plaintiffs herein will have destructive, harassing, intimidating and "chilling" effects upon Federal rights described above and in particular those guaranteed by the First Amendment, not only of Plaintiffs who would in fact be prosecuted, but upon the rights of every member of the classes they represent.

22. Unless this Court restrains the operation and

enforcement of this void, invalid and unconstitutional state statute, Plaintiffs and the members of the COMMITTEE and its friends and supporters will suffer immediate and irreparable injury. Every day that the said charges pend against individual Plaintiffs, members of the COMMITTEE and its friends and supporters will be fearful of exercising Federal rights described above and in particular those guaranteed by the First Amendment lest they be likewise prosecuted. The same "chilling effects" on First Amendment rights will result from trials of Plaintiffs even though they be ultimately acquitted.

23. Accordingly, unless this Court restrains the operation and enforcement of this void, invalid and unconstitutional state statute, Plaintiffs and members of the UNIVERSITY COMMITTEE and its friends and supporters will continue to suffer the most serious, immediate and irreparable injury in that they will continue to be deterred, intimidated, hindered and prevented from exercising elementary and fundamental constitutional rights.

24. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray for the following relief:

1. That pursuant to 28 U.S.C. 2281 and 2284 a three-judge Federal District Court be immediately convened to hear and determine this proceeding;

2. That a permanent injunction issue

   a. Restraining the appropriate Defendants, their agents, servants, employees and attorneys and all others acting in concert with them from the enforcement, operation or execution of Article 474, Vernon's Texas Penal Code; and

b. Restraining the appropriate Defendants, their agents, servants, employees and attorneys and all others acting in concert with them from impeding, intimidating, hindering and preventing Plaintiffs and members of the UNIVERSITY COMMITTEE and its friends and supporters from exercising the rights, privileges and immunities guaranteed them by the Constitution and laws of the United States.

3. That a declaratory judgment issue declaring that Article 474, Vernon's Texas Penal Code, is void on its face and null and void as violative of the Constitution of the United States, and/or as applied to the conduct of the Plaintiffs herein;

4. That pending the hearing and determination of the prayers for permanent relief, an interlocutory injunction issue restraining the Defendants, their agents, servants, employees and attorneys and all others acting in concert with them from enforcing in any way the provisions of Article 474, Vernon's Texas Penal Code, and from instituting or undertaking any proceedings whatsoever pursuant to said statute against the Plaintiffs herein, members of the UNIVERSITY COMMITTEE or its friends and supporters;

5. That pending the hearing and determination of the prayers for permanent relief, an interlocutory injunction issue restraining the appropriate Defendants, their agents, servants, employees and attorneys and all others acting in concert with them from prosecuting or trying any of the said pending charges under Article 474, Vernon's Texas Penal Code; and

6. For any and all other relief which this Court

may see fit to grant and to which Plaintiffs may be entitled.

Plaintiffs respectfully pray that the above relief be granted.

/s/ ----------
SAM HOUSTON CLINTON, JR.
205 Texas AFL-CIO Building
308 West 11th Street
Austin, Texas 78701
Attorney for all Plaintiffs

(Jurat omitted in printing)

APPENDIX "A"

"Art. 474. 470, 334 Disturbing the peace

"Whoever shall go into or near any public place, or into or near any private house, and shall use loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or yell or shriek or expose his or her person to another person of the age of sixteen (16) years or over, or rudely display any pistol or deadly weapon, in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200). As amended Acts 1950, 51st Leg., 1st C.S., p. 50, ch. 10, § 1."

CIVIL ACTION 67-63-W

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
WACO DIVISION

* * *

(Title omitted in printing)

* * *

DEFENDANTS' ANSWER TO MOTION FOR INJUNCTION

* * *

TO THE HONORABLE JUDGE OF SAID COURT:

Come now Lester Gunn, Sheriff of Bell County, Texas, A. M. Turland, Justice of the Peace, Bell County, and John T. Cox, County Attorney, Bell County, Texas, Defendants, by and through Crawford C. Martin, Attorney General of Texas, and file this their answer in the above titled and numbered cause.

I.

Defendants admit that certain of the Plaintiffs were arrested and put through ordinary booking procedures on the occasion set forth in Plaintiffs' Original Complaint. Defendants aver that these arrests were made in connection with a disturbance which breached the peace of the community which had existed theretofore and which was restored immediately following said arrests.

II.

Defendants deny all and singular each and every of those allegations that claim combination by any or all

Defendants to deny any and all of the Plaintiffs their rights under the Constitution of the United States of America. Defendants further deny any conspiracy on their part for any improper or illegal purposes. Defendants deny that the amount in controversy exceeds Ten Thousand Dollars ($10,000.00).

III.

Defendants deny as a matter of law that Article 474, Vernon's Texas Penal Code, is in any way unconstitutional under the Constitution of the United States.

IV.

Defendants deny that Plaintiffs are in need of equitable relief in order to preserve any and all of their rights under the Constitution of the United States for the reason that none of the Defendants have in any way threatened to do any act which would harass any of the Plaintiffs anytime in the future and thereby deprive them of any such constitutional rights.

V.

Defendants deny that Plaintiffs are entitled either at law or in equity to any injunctive relief and aver that an adequate remedy exists in the form of a trial on the merits under the Texas Code of Criminal Procedure at which time a full and fair hearing may be held.

WHEREFORE, premises considered, Defendants pray the Court to hold for naught the application of the Plaintiffs for injunctive relief and declaratory

judgment and that they be sent hence without day and of this Defendants put themselves upon the country.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas
R. L. LATTIMORE
Assistant Attorney General

HOWARD M. FENDER
Assistant Attorney General
Attorneys for Defendants
Box R, Capitol Station
Austin, Texas 78711

(Certificate of Service omitted in printing)

CIVIL ACTION 67-63-W

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
WACO DIVISION

* * *

(Title omitted in printing)

* * *

DEFENDANTS' MOTION TO DISMISS

* * *

TO THE HONORABLE JUDGES OF SAID COURT:

Come now Lester Gunn, Sheriff of Bell County, Texas, A. M. Turland, Justice of the Peace, Bell County, and John T. Cox, County Attorney, Bell County, Texas, Defendants, by and through Crawford C. Martin, Attorney General of Texas, and file this Motion to Dismiss the instant cause for the reason the subject matter hereof has become moot. Attached hereto as "Appendix A" and made a part hereof are copies of the three complaints which were filed against the three named plaintiffs together with copies of Motion to Dismiss the said complaints and orders of the Court dismissing same. Defendants would show the Court that no useful purpose could now be served by the granting of an injunction to prevent the prosecution of these suits because same no longer exists. Plaintiffs can ask no greater relief in the instant cause than that the complaints heretofore filed be dismissed for want of jurisdiction.

WHEREFORE, PREMISES CONSIDERED, Defendants move the Court to Dismiss the instant cause as being moot.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas
R. L. LATTIMORE
Assistant Attorney General

HOWARD M. FENDER
Assistant Attorney General
Attorneys for Defendants
Box R, Capitol Station
Austin, Texas 78711

(Certificate of Service omitted in printing)

COMPLAINT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

BEFORE ME, the undersigned authority, this day personally appeared Frank Strange, who, after being sworn, upon oath deposes and says (that he has good reason to believe and does believe and charge) that one James Mayfields Damon on (or about) the 12th day of December, A.D. 1967, and before the making and filing of this complaint, in Justice of Peace Precinct No. 4 of Bell County, State of Texas, did then and there unlawfully and wilfully Dist The Peace against the peace and dignity of the State.

FRANK STRANGE

Sworn to and subscribed before me, this 12th day of December, A.D. 1967.

A. M. TURLAND
Justice of the Peace,
Precinct No. 4,
Bell County, Texas

No. 32,790

THE STATE OF TEXAS

vs.

JAMES M. DAMON
IN THE JUSTICE COURT

Precinct 4
Bell County, Texas

MOTION TO DISMISS

Now comes JOHN T. COX, County Attorney in and for Bell County, Texas, and moves the Court to dismiss the above cause as it appears that the alleged offense occurred on a Federal enclave and criminal jurisdiction was ceded by the State of Texas.

JOHN T. COX
County Attorney

This the 13th day of February, 1968, came on to be heard the written statement and motion of the State's attorney filed herein, and the Court is satisfied that the reason so stated is good and sufficient to authorize such dismissal, it is therefore considered, ordered and adjudged that this criminal action be and the same is dismissed and that the defendant be discharged.

A. M. TURLAND
Justice of Peace
Precinct 4
Bell County, Texas

COMPLAINT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

BEFORE ME, the undersigned authority, this day personally appeared Frank Strange, who, after being sworn, upon oath deposes and says (that he has good reason to believe and does believe and charge) that one John Edwin Morby on (or about) the 12th day of December, A.D. 1967, and before the making and filing of this complaint, in Justice of Peace Precinct No. 4 of Bell County, State of Texas, did then and there unlawfully and wilfully Dist The Peace against the peace and dignity of the State.

FRANK STRANGE

Sworn to and subscribed before me, this 12th day of December, A.D. 1967.

A. M. TURLAND
Justice of the Peace,
Precinct No. 4,
Bell County, Texas

No. 32,791

THE STATE OF TEXAS

vs.

JOHN E. MORBY
IN THE JUSTICE COURT

Precinct 4
Bell County, Texas

MOTION TO DISMISS.

Now comes JOHN T. COX, County Attorney in and for Bell County, Texas, and moves the Court to dismiss the above cause as it appears that the alleged offense occurred on a Federal enclave and criminal jurisdiction was ceded by the State of Texas.

JOHN T. COX
County Attorney

This the 13th day of February, 1968, came on to be heard the written statement and motion of the State's attorney filed herein, and the Court is satisfied that the reason so stated is good and sufficient to authorize such dismissal, it is therefore considered, ordered and adjudged that this criminal action be and the same is dismissed and that the defendant be discharged.

A. M. TURLAND
Justice of Peace
Precinct 4
Bell County, Texas

COMPLAINT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

BEFORE ME, the undersigned authority, this day personally appeared Frank Strange, who, after being sworn, upon oath deposes and says (that he has good reason to believe and does believe and charge) that one Zegmunt William Smigaj, Jr. on (or about) the 12th day of December, A.D. 1967, and before the making and filing of this complaint, in Justice of Peace Precinct No. 4 of Bell County, State of Texas, did then and there unlawfully and wilfully Dist The Peace against the peace and dignity of the State.

FRANK STRANGE

Sworn to and subscribed before me, this 12th day of December, A.D. 1967.

A. M. TURLAND
Justice of the Peace,
Precinct No. 4,
Bell County, Texas

No. 32,789

THE STATE OF TEXAS

vs.

ZEGMUNT W. SMIGAJ, JR.
IN THE JUSTICE COURT

Precinct 4
Bell County, Texas

MOTION TO DISMISS

Now comes JOHN T. COX, County Attorney in and for Bell County, Texas, and moves the Court to dismiss the above cause as it appears that the alleged offense occurred on a Federal enclave and criminal jurisdiction was ceded by the State of Texas.

JOHN T. COX
County Attorney

This the 13th day of February, 1968, came on to be heard the written statement and motion of the State's attorney filed herein, and the Court is satisfied that the reason so stated is good and sufficient to authorize such dismissal, it is therefore considered, ordered and adjudged that this criminal action be and the same is dismissed and that the defendant be discharged.

A. M. TURLAND
Justice of Peace
Precinct 4
Bell County, Texas

CIVIL ACTION 67-63-W.

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
WACO DIVISION

* * *

(Title omitted in printing)

* * *

DEFENDANTS' MEMORANDUM ON MOTION TO DISMISS

* * *

TO THE HONORABLE JUDGES OF SAID COURT:

Defendants submit this memorandum in support of their Motion to Dismiss.

Plaintiff is seeking a declaratory judgment under the provisions of Title 28, U.S.C.A., § 2201 which provides, inter alia "in a case of actual controversy within its jurisdiction . . .". In view of the dismissal of the criminal charges heretofore pending against the three named plaintiffs (and which criminal charges formed the basic subject matter of the instant cause) defendants urge that no "actual controversy" exists at this time.

In *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, decided March 26, 1962, the Supreme Court recognized the principle at 369 U.S. 204 that:

> "A federal court cannot 'pronounce any statute, either of a state or of the United States void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' Liverpool, N.Y.

& P. Steamship Co. v. Commissioners of Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899."

In *Grise v. Combs,* 183 F.Sup. 705, an effort was being made to obtain declaratory judgment before a three judge court to prevent a feared invasion of constitutional right. That Court said:

> "The District Court of the United States is a court of limited jurisdiction. It has no authority beyond that specifically granted by the statutes. It is the duty of litigants to make clear the basis of jurisdiction over the action. It is the duty of the court to satisfy itself that jurisdiction exists. If jurisdiction is not present, the court must not proceed with the determination of the merits of the controversy. The authority of the court to proceed to an adjudication is limited by the source of that authority, that is, the Constitution of the United States. It must be shown from the record of the plaintiff's case that there is presented for determination an existing dispute as to present legal rights. Whenever it appears that the court lacks jurisdiction of the subject matter, the action must be dismissed. Rule 12(h) (2), Rules of Civil Procedure, 28 U.S.C.A.; Emmons v. Smitt, 6 Cir., 149 F.2d 869; Stewart v. United States, 7 Cir., 199 F.2d 517."

The Court went on to say:

> "There must be actual interference. A prospective or hypothetical threat is not sufficient. There must be no speculation that the plaintiffs' rights may at some future date become involved. Definite rights must appear at stake on the part of the plaintiffs and definite prejudicial interferences upon the part of the defendants. The federal courts, established by statutes implementing the provisions of Article III of the Constitution, cannot render advisory opinions. Concrete issues, not

abstractions, must appear on the face of the record. Threat of possible interference does not make a justiciable case or controversy. United Public Workers of America (CIO) v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754; Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407."

The Court further stated:

"The Declaratory Judgment Act of 1934, now 28 U.S.C. § 2201, provides that in cases of actual controversy a competent court may declare the rights and other legal relations of a party. It does not change the essential requisites for the exercise of judicial power nor extend to the determination of abstract questions. Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291; Aetna Life Insurance Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617. 'Claims based merely upon "assumed potential invasions" of rights are not enough to warrant judicial intervention.' Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466, 472, 80 L.Ed. 688; State of Arizona v. State of California, 283 U.S. 423, 462, 51 S.Ct. 75 L.Ed. 1154."

In *Cargill, Incorporated v. United States,* 188 F. Sup. 386, the plaintiff was complaining that certain actions by an agency of the United States government were invasions of his constitutional rights. The question was raised before the three judge federal court that:

". . . and that the Commission will probably enter a final order of dismissal to make the matter 'moot' before this Court can hear and decide the issues and that such practice, too, has been followed in the past and is continuing to plaintiffs' damage."

In disposing of the matter, the Court said:

"It is the duty of this Court to 'decide actual controveries by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293. This principle was recently restated by the Supreme Court in the case of Local No. 8-6, Oil, Chemical & Atomic Wkrs. v. Missouri, 361 U.S. 363, 80 S.Ct. 391, 4 L.Ed. 2d 373. In this latter case an injunction had been granted against a union under authority of a Missouri statute; the Supreme Court of Missouri held the statute constitutional and certiorari was granted to the Supreme Court of the United States; in the meantime the injunction had expired and in deciding the matter the Court said at 361 U.S. loc.cit. 367, 80 S.Ct. loc.cit. 394: '* * * we cannot escape the conclusion that there remains for this Court no "actual matters in controversy essential to the decision of the particular case before it." United States v. Alaska S.S. Co., 253 U.S. 113, 116, 40 S.Ct. 448, 449, 64 L.Ed. 808.'"

"'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.' Amalgamated Ass'n. etc. v. Wisconsin Emp. Rel. Bd., 340 U.S. 416, 418, 71 S.Ct. 373, 375, 95 L.Ed. 389. The very proposition here was involved in two recent decisions wherein the Supreme Court of the United States remanded three-judge court opinions with directions to dismiss for mootness. See Dixie Carriers, Inc., v. U.S., D.C., 143 F.Supp. 844; Atchison, T. & S.F.R. Co. v. Dixie Carriers, Inc., 355 U.S. 179, 78 S.Ct. 258, 2 L.Ed. 2d 186, and Amarillo-Borger Express v. United States, D.C. 138 F.Supp. 411; Id., 352 U.S. 1028, 77 S.Ct. 594, 1 L.Ed.2d 598.

"The same reasoning applies to the prayer for declaratory judgment relief. Section 2201, Title 28 U.S.C., creates a remedy 'In a case of actual controversy within its jurisdiction, * * *' "

In *Audiocasting, Inc. v. State of Louisiana,* 143 F. Supp. 922, there appears a thorough discussion of the function of the declaratory judgment in connection with adjudication of constitutional rights under state statutes. The Court in Audiocasting declined to take jurisdiction by stating in effect that the federal court should not interfere in the interpretation of a state statute until an adverse interpretation had been handed down by a state court so that an appeal therefrom to the federal courts would be binding and would terminate the controversy.

And lastly in *Continental Nut Company v. Benson,* 166 F.Supp. 142, where an effort was made to obtain a declaratory judgment after the normal course of events had rendered the normal subject matter moot the Court said:

"Whatever may be the function of the person empowered to conduct the administrative proceeding prescribed in the Act, it is not the duty of the Court to determine a moot, hypothetical or abstract question. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688. It is beyond the power of the Court to make any order now which would be able to put more almonds of the 1954-1955 crop into today's domestic market. Such an order would, in the words of Mr. Justice Holmes, be but 'a mere declaration in the air.' Giles v. Harris, 189 U.S. 475, 486, 23 S.Ct. 639, 642, 47 L.Ed. 909. It is not within the province of the Court to make interpretative rulings when there is no actual controversy at bar; such is the case.

". . .

"Consequently, inasmuch as it is the opinion of the Court that the issue at bar is moot, and that there is no justiciable controversy before the Court, the Court cannot look into the propriety of the defendant's ruling."

In view of the foregoing authorities, Defendants urge the Court to grant the Motion to Dismiss and send the Plaintiffs hence without day.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas
R. L. LATTIMORE
Assistant Attorney General

HOWARD M. FENDER
Assistant Attorney General
Attorneys for Defendants
Box R, Capitol Station
Austin, Texas 78711

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Title omitted in printing)

PLAINTIFFS' MEMORANDUM ON DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE JUDGES OF SAID COURT:

Plaintiffs submit this brief memorandum to demonstrate that Defendants' Motion to Dismiss is not well taken.

1.

Subject Matter Not Moot

The suggestion that because the complaints against Plaintiffs have been dismissed "the subject matter hereof has become moot" since "no useful purpose could now be served by the granting of an injunction to prevent prosecution of these suits" (M/D, pp. 1-2) mistakenly construes the full nature of this cause. This is a suit not only for injunctive relief but also for declaratory judgment that the state statute under attack "is void on its face and null and void as violative of the Constitution of the United States, and/or as applied to the conduct of the Plaintiffs herein" and "any and all other relief which this Court (meaning also the United District Court for the Western District of Texas as generally constituted) may see fit to grant and to which Plaintiffs may be entitled"—language broad enough to include, or to permit an amendment to include, specific prayer for money damages.

Thus, merely dismissing the pending prosecutions does not make moot the very live issues concerning validity for Article 474, P.C., its continued enforcement

in future instances of demonstrations by Plaintiffs and members of the classes they represent, and damages suffered by Plaintiffs from their arrest, charges, confinements, examinations, bail bonds, attorneys fees, loss of time, physical injuries, mental anguish and suffering and exemplary damages.

2.

Analysis of Complaint

Plaintiffs complain that Article 474, P.C., is "void and illegal on its face and as applied," that it "violates the fundamental guarantees of free speech, press, assembly and the right to petition the Government for redress of grievances," that it "is vague and indefinite and fails to meet the requirement of certainty in criminal statutes (Complaint, para. 17, pp. 4-5). Thus the attack includes both "overbreadth" and "void-for-vagueness" doctrines.

It is true they allege that unless restrained from doing so Defendants will prosecute *the pending charges* to deter Plaintiffs from exercising their rights (Id., para. 21, pp. 5-6) BUT, they also allege that unless "this Court restrains the operation and enforcement of this void, invalid and unconstitutional statute, Plaintiffs and the members of the COMMITTEE and its friends and supporters will suffer immediate and irreparable injury" not only from pendency of the charges but also "from trials of Plaintiffs even though they be ultimately acquitted" (Id., para. 22, p. 6); and, further, they allege that "unless this Court restrains the operation and enforcement of this void, invalid and unconstitutional state statute, Plaintiffs and members of the UNIVERSITY COMMITTEE and its friends and supporters will continue to suffer" irreparable injury "in that they will continue to be de-

terred, intimidated, hindered and prevented from exercising elementary and fundamental constitutional rights (Id., para. 23, p. 6).

Based upon these and other allegations, Plaintiffs asked that a three-judge court be convened, as it has been, "to hear and determine this proceeding," and for other relief alluded to above, including an interlocutory injunction against "enforcing *in any way* the provisions of Article 474 . . . and from instituting or undertaking *any proceedings whatsoever* pursuant to said statute" against Plaintiffs et al. (Id., para. 4, p. 7). Indeed, only one item in the prayer treats the pending charges (Id., para. 5, p. 7). See also allegations in Motion for Preliminary Injunction and the affidavit in support of motion for convening three-judge court.

In short, enjoining prosecution of the pending charges is only a relatively minor element in this cause.

3.

A Substantial Controversy

Dismissing the pending charges does not quell the controversy between the parties—particularly in view of the grounds on which the same were dismissed. (As pointed out in our heretofore filed memorandum (p. 13), that Defendants were acting under color of law, but actually without legal authority, supplies more support for Plaintiffs' contention that they were seeking to deprive and deny exercise of First Amendment rights rather than vindicate criminal laws.) That Defendants assertedly lack jurisdiction over grounds of Central Texas College—an unproved assertion so far—may resolve the pending charges, but the issue of constitutionality of Article 474 remains unresolved.

Defendants' Answer denies that Article 474 "is in any way unconstitutional under the Constitution of the United States" (Answer, para. III, p. 2), that "plaintiffs are in need of equitable relief in order to preserve any and all of their rights . . . for the reason that none of the Defendants have in any way threatened to do any act which would harass any of the Plaintiffs any time in the future and thereby deprive them of any such constitutional rights" (Id., para. IV, p. 2) or that plaintiffs are entitled "to *any* injunctive relief," suggesting application of abstention doctrine (Id., para. V, p. 2). These denials clearly recognize that the cause of action is much broader than just bringing pending charges to a halt.

Thus, the issues drawn by the pleadings pose a continuing controversy. The evidence contained in Agreed Statement of Facts and Stipulations show a continuing controversy; (see e.g. Damon, pp.4-5; Morby, p. 3; Smigaj, p. 5; Granville, p. 4; Jumonville, p. 3-4), discussed briefly in pretrial memorandum hereto filed, pp. 12-15. Moreover, it is highly significant that neither the Motion to Dismiss nor any other paper filed by Defendants disclaim any intention of presenting and prosecuting any such similar "disturbing the peace" charges against Plaintiffs or members of the classes they represent IN THE FUTURE. Compare *Carmichael v. Allen,* 267 F. Supp. 985 (D.C. N.D., Ga., 1966): ". . . neither Mr. Slaton nor any other representative of the state of Georgia has disavowed any further intention to use these statutes in the future. It is hardly necessary to point out the 'chilling' effect upon the exercise of the freedom of speech and assembly . . . if a person, conscientiously seeking to exercise these rights, must pattern his speech with the ever present threat of such a sanction."

Finally, by analogy to exercise of the abstention doctrine, it would appear that necessity for injunctive relief against charges no longer pending is a matter separate and apart from declaratory relief and whatever injunctive relief may appropriately follow the declaratory judgment; see *Zwickler v. Koota,* —— U.S. ——, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967) at 399:

> "We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction. . . . It will be the task of the District Court on remand to decide whether an injunction will be 'necessary or appropriate' should appellant's prayer for declaratory relief prevail."

WHEREFORE, Plaintiffs urge that Motion to Dismiss be set for hearing and upon hearing in all things denied.

Respectfully submitted,

SAM HOUSTON CLINTON, JR.
205 AFL-CIO Building
308 West 11th Street
Austin, Texas 78701
Attorney for Plaintiffs

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Title omitted in printing)

AGREED STATEMENT OF FACTS AND STIPULATION

THE UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, JAMES M. DAMON, JOHN E. MORBY and ZIGMUNT W. SMIGAJ, JR., Plaintiffs, and LESTER GUNN, A. M. TURLAND, and JOHN T. COX, Defendants, by and through their respective attorneys, hereby agree and stipulate that the following statements are true and correct and that the contents of this agreed statement and stipulations shall be filed with the Clerk of the Court and be considered, along with other papers on file in this cause, by the Court in determining and deciding the issues in this cause.

1.

UNIVERSITY COMMITTE TO END THE WAR IN VIET NAM (UNIVERSITY COMMITTEE) is an unincorporated voluntary association composed of young men and women who are residents of Austin, Travis County, Texas, and its environs; they have banded together to protest the conduct of the war in Viet Nam by means of discussions, publications, demonstrations and non-violent direct action—all in an attempt to bring the war in Viet Nam to a quick, non-military end. JAMES M. DAMON, JOHN E. MORBY and ZIGMUNT W. SMIGAJ, JR., are citizens of the United States and residents of Austin, Travis County, Texas. DAMON and MORBY are members of the UNIVERSITY COMMITTEE; SMIGAJ is not a formal member of the UNIVERSITY COMMITTEE but

is sympathetic to its purposes and undertakings and a participant in its affairs.

2.

LESTER GUNN is a citizen of the United States and of the State of Texas and is the duly elected and serving Sheriff of Bell County, Texas. A. M. TURLAND is a citizen of the United States and of the State of Texas and is the duly elected and serving Justice of the Peace, Bell County, Texas, Precinct No. 4. JOHN T. COX is a citizen of the United States and of the State of Texas and is the duly elected and serving County Attorney of Bell County, Texas.

3.

During Monday, December 11, and the morning of Tuesday, December 12, 1967, various news media in the Central Texas area reported that the President of the United States was to appear and speak at a dedicatory program at Central Texas College. Central Texas College is situated near Killeen, Bell County, Texas. Killeen is a city of some 30,000 population and serves nearby Fort Hood, a large United States military establishment, reputed to be the largest United States armored post; Fort Hood has a population of about 35,000 soldiers and an equal number of civilian dependents. From Fort Hood military members of armored units of the United States Army are transferred to Viet Nam and from Viet Nam many veterans of military service there are transferred to Fort Hood. The President of the United States was also scheduled to make an inspection of Fort Hood on December 12, 1967. Accompanying the President and his official party on the occasion of his appearance at Central Texas College was the usual corps of so-called White House press correspondents, and other representatives of the

news media including television commentators and cameramen. Some 25,000 military personnel, their dependents, and civilians from in and around the Central Texas area were assembled to hear the President of the United States and other speakers on the dedicatory program.

4.

The President of the United States addressed the assembled throng and his voice was amplified over a loudspeaker system. Behind and to the east of a segment of the assembled persons facing the President of the United States and on the grounds of Central Texas College is a street, further to the east of which is a parking area; this street and the ground immediately adjacent thereto is elevated slightly above the area in which the segments of assembled listeners were located. As the President of the United States was speaking several persons, including Plaintiffs DAMON, MORBY and SMIGAJ, approached the rear of the gathered crowd from the general area of the street and parking area; some of them were carrying signs or placards bearing legends and writings. They were observed by members of smaller scattered groups located east of the assembled crowd, and as they neared and entered the fringe of the crowd itself by many members of that larger assemblage.

5.

Within a matter of minutes, and while the President of the United States was still speaking, several off-duty military personnel accosted Plaintiffs DAMON, MORBY and SMIGAJ and other members of the UNIVERSITY COMMITTEE accompanying them. Plaintiffs were then restrained by military policemen. They were turned over to Bell County deputy sheriffs,

who were present at request of the U.S. Secret Service. They were taken to police cars, made to lean against a car, were searched and handcuffed, after which they were placed in one or another of two police cars and taken to the Killeen City Jail.

6.

Plaintiffs DAMON, MORBY and SMIGAJ were each charged with disturbing the peace in violation of Article 474, Vernon's Texas Penal Code. Attached hereto as Exhibits ——, —— and —— are true and correct copies of the complaints, informations and bonds with respect to DAMON, MORBY and SMIGAJ, respectively. The amount of bail was set by A. M. TURLAND after Sheriff LESTER GUNN, his deputies, and other law enforcement officers had taken DAMON, MORBY and SMIGAJ before him. Thereafter, DAMON, MORBY and SMIGAJ were returned to the Killeen City Jail where they were booked, fingerprinted and photographed and confined to cells until they were transferred by Sheriff GUNN or his deputies to Belton, Bell County, Texas, where they were again confined to cells in the Bell County Jail until released on bond.

7.

Attached hereto are affidavits made by the affiants identified therein. Each such affiant, if called to testify personally before the Court in this cause, would testify in accordance with the contents of his affidavit, and the matters of fact and statements contained in such affidavits may be considered by this Court as if the affiant therein were personally testifying before the Court to the matters of fact and statements contained in his affidavit.

WITNESS OUR HANDS this ____ day of February, 1968.

SAM HOUSTON CLINTON, JR.
205 Texas AFL-CIO Building
308 West 11th Street
Austin, Texas 78701

Attorney for Plaintiffs

CRAWFORD C. MARTIN
Attorney General of Texas

By: _____
HOWARD FENDER
Assistant Attorney General of Texas
Capitol Station
Austin, Texas 78711

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Title omitted in printing)

AFFIDAVIT IN SUPPORT OF COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this day personally appeared JOHN E. MORBY who after being by me duly sworn did on his oath depose and say:

My name is John E. Morby; I am a resident of Austin, Travis County, Texas, above twenty-one years of age and otherwise competent to make this affidavit and the statements contained therein.

I am an instructor of history at the University of Texas; I have taught there for three years. I am a member of the University Committee to End the War in Viet Nam (University Committee) and am an active participant in its affairs and activities.

On the morning of Tuesday, December 12, 1967, I learned that President Johnson was to speak outside Killeen, Texas, at the dedication of Central Texas College. I went up, with six others in two cars, including James M. Damon and Zigmunt W. Smigaj, Jr., to demonstrate peacefully against the Vietnam war. Our protest was to be a general one—we had no specific objective like spreading disaffection among the soldiers or denouncing the draft.

We parked by a road east of the college, got out our protest signs, and walked over the hill and down a gentle slope toward the college. The President's voice

was coming in over the loudspeaker; the crowd was large. As we drew near, we noticed that the rear of the crowd, nearest our approach, was composed almost entirely of soldiers. We kept going until we were among the soldiers.

Our signs were visible but innocuous. Mine said, "I have only one idol—Hitler," a quote by Vice-Marshal Ky. Other signs said, "The Vietnam war may be the opening phase of World War III" (U Thant), and "Wrong war, wrong time, wrong place" (General Shoup, ex-Commandant, U.S.M.C.). No sign was abusive or obscene.

As soon as the soldiers became aware of our presence, many of them attacked us. I saw a sign wrenched from the hand of one of the protestors. There had been absolutely no provocative behavior on our part—no word, gesture, or action—no shouted insults, no buildup. The soldiers attacking us did so instantaneously without any specific action on our part. There was simply no time for such action—we were set upon too quickly for that, and we had in any case intended no such action.

The following moments were filled with activity. An enormous M.P. seized me and pushed me back (away from the President). Others joined him, apparently police or men from the sheriff's office. My arms were pinioned tightly behind me, and my right arm pushed up toward my neck. Others had my neck in a vise-like grip—I genuinely felt I was being strangled. I yelled "Help!" as best I could. Someone said, "Kill that sonofabitch." Then I was at a police car, my head thrust in a window, handcuffs put on. The pinning of my arms was preliminary to the handcuffs. Ray Reece, a fellow-demonstrator, saw the sheriff's men roughing me up. The handcuffs were so tight that my wrists

swelled, the left one prodigiously, and I still had marks on it several days later.

I and two others—James Damon and Zigmunt Smigaj—were taken to Killeen Jail. I was completely stripped and thoroughly searched, my belongings confiscated. I was placed in a cell, separated from my fellow-demonstrators. Sometime later we were taken by car to A. M. Turland, a Justice of the Peace, and arraigned for "Disturbing the Peace." Bail was set at $500. We were told by the J.P. that no checks were acceptable. The J.P. said, "I really want to try this case, and I want to be sure you'll be here." Some lawmen, standing around, uttered various threats and expressions of disapprobation—they also expressed their alarm and horror that I taught at the University of Texas. One toyed with live pistol cartridges. We were then taken back to jail, elaborately photographed and fingerprinted, by an officer who revealed that Ho Chi Minh was Chinese, not Vietnamese, and who cheerfully informed us that at Belton, where we were to be taken, we would be placed in the same cell with murderers. We were returned to our cell—together, this time, awaiting transfer to Belton. We arrived there and were again jailed, but soon after a lawyer got us out on bond.

Although Killeen and Fort Hood provide several good reasons for demonstrating against the war in Viet Nam, my treatment by deputy sheriffs, Justice of the Peace A. M. Turland and others, and pending charges against me for "disturbing the peace" have prompted me to postpone any activities supporting the University Committee in Bell County or elsewhere lest I again be charged with "disturbing the peace" or some similar offense. The events of December 12, 1967, and the fact that charges against me are pending have cur-

tailed my exercise of freedom of speech and expression. In addition, the fact that I was arrested, charged and made bond was widely reported by the news media, and for a time there was a question about disciplinary action being taken against me by the University of Texas. This caused me mental anguish and suffering and distressed my wife. Until the charges are disposed of I do not intend to engage in such demonstrations again.

All statements made in the above and foregoing affidavit consisting of three typewritten pages are true and correct.

/s/ ----------
JOHN E. MORBY

SUBSCRIBED AND SWORN TO before me by the said John E. Morby this 6th day of February, 1968.

/s/ ----------
Notary Public in and for
Travis County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Title omitted in printing)

AFFIDAVIT IN SUPPORT OF COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this day personally appeared ZIGMUNT W. SMIGAJ, JR., who after being by me duly sworn did on his oath depose and say:

My name is Zigmunt W. Smigaj, Jr.; I am a resident of Austin, Travis County, Texas, above twenty-one years of age and otherwise competent to make this affidavit and the statements contained therein.

I am a graduate student at the University of Texas at Austin. I am not a formal member of the University Committee to End the War in Viet Nam (University Committee), but I am sympathetic to its purposes and undertakings and have participated in its affairs. I know many other persons who feel and do the same, although actually not members of the University Committee. We attempt to inform students of the nature of the war in Vietnam and by peaceful means such as picketing and demonstrating, to enlist the support of all people in the Central Texas area to bring about an end to the war.

At about 8:30 A.M., December 12, 1967, one of the members of the University Committee called me and informed me that the members of this committee were being contacted so that a group of us could be assembeled to go to Killeen for a peaceful demonstration.

He informed me that the occasion was the dedication of a college, at which President Johnson was to deliver a speech. The intention was to go and be present as a reminder to the President and the audience that some citizens disagreed with his policy on Vietnam. We planned no counter-speeches, no interference with the president's right to speak or the right of the audience to hear him. We were all conservatively dressed (I was clean shaven and wearing a suit, the others were similarly attired) and we chose our signs to be what we thought would be the least offensive ones possible which would still reflect our concern over the issue. The signs were quotations from President Eisenhower, General Ky, General Shoup, U. Thant, and of a similar nature. The signs that were carried by the seven of us (in our group) contained no mention of atrocities, no derogatory remarks about the President or any other public official, no attempt to equate the war with genocide or racism. The three of us who were consequently arrested carried the following signs: mine, "The War in Vietnam May Be the Initial Phase of World War III. 'U. Thant';" John E. Morby's, "I Have but One Idol—Hitler. General Ky;" and James M. Damon's, "Wrong War, Wrong Time, Wrong Place. General Shoup."

We drove to the college area and parked our two cars next to the highway, east of the area, and unloaded our signs. We could not see the bulk of the audience, but we could hear the President speaking. From the sound of the speech we could tell that we would have to walk up a gradual incline, for the sound was coming from the other side of this hill. We could at this time, and for the next couple of minutes of our walk toward the crowd, see only scattered groups of people who were milling around, some going toward the sound,

some away, some just standing. I could see some security officers, but they made no move to stop us or question us.

We started to walk up the hill toward the sound, and the scattered groups gave us various responses as we went on. Some applauded, some stared, a Negro gentleman smiled and made a motion to take our picture so some of us halted briefly and complied. Someone shouted something to the effect that we should "get out of here, we don't need your kind," and a young man ran up to us and shouted, "What do you know about it, have you ever been to Vietnam?" We did not stop to argue with any of these individuals, nor did we shout any reply. During the walk up we had become strung out, so we paused for a moment to allow the others to catch up, to regroup ourselves so that as individuals we would not be lost in the crowd. We started to walk down into the crowd, and I tried to head us towards the part that seemed to be jeering us the least.

Things now develop very rapidly, and are a bit confusing. We were now surrounded by jeering (and a few who were apparently trying to help us) soldiers in uniform. We were still walking forward, in silence, when I looked to my right and saw that the sign was ripped from Ray Reece and he was slugged. Immediately after that my sign was ripped away and I was slugged by a soldier. I was dazed and bleeding from the mouth, I did not slug back or even scream out, I merely tried to cover my face and twist around to keep from being pinned and beaten. I heard screams, including either "Kill him" or "Kick him." The next thing I remember was being grabbed and shoved rapidly in some direction. I looked and saw that I was now in the hands of some policemen, so I complied

completely with their escorting me away from the crowd. As we were starting our exit, someone came alongside of us, screamed "Take this back with you," threw some pieces of a torn up poster in my face, and slapped at me.

The officers escorted me a few yards farther, and then pushed me against a parked car, where I was searched, and handcuffed. One young lady stood about a yard from me, hopped around, and with a very red face screamed over and over, "there's one of them." While I was being searched and handcuffed, I could see part of what was happening to James Damon and John Morby. They were each the center of a group of security officials, who were wrestling them around. We were all eventually searched and handcuffed, and led away to a car. I was in the rear of the procession, and I noticed that walking by me were two members of the press, one holding what appeared to be a microphone, and the other taking pictures with a large movie camera. Realizing this, I started to talk and continued to do so until we reached the car. I don't remember the exact words, but this is a close facsimile: "Am I being arrested? Why am I being arrested? All I did was walk quietly carrying a sign. Why aren't the ones who hit me being arrested, rather than me? I didn't do anything. Does anyone know why I am being arrested?" Throughout this no one would answer. We just kept moving along.

Up until this point no law officer had said anything to me other than commands such as "move along," and this came after I had already been searched and handcuffed. No law officer said anything to me at this point about being arrested, or about my rights, nor did any of them comment on this until after we were in the jail.

We were put in a car, James Damon and I in the front, John Morby in the rear. One of the officers in the rear grabbed our collars and pulled back so that we rode into town staring at the ceiling and choking. I could still talk a little so I requested him to loosen up since I wasn't resisting or going anywhere. He did not answer but continued to apply pressure most of the way in. I heard Morby request that the handcuffs be loosened since his wrist and elbow were hurting badly. The answer was in effect that handcuffs were not made for comfort.

We arrived at the jail, were taken in and again searched. We laid our possessions on a bench as ordered, and when I tried to pick up my handkerchief (my mouth was still slightly bleeding, a fact which I related to the officer), I was ordered to leave it alone, and to stand still. A few minutes later I requested again that I be allowed to pick up the handkerchief and this time a different officer said that I could. After this was over one of the officers said we could each have one telephone call, and one of us asked what we were being arrested for and what would happen next. One officer said we would be taken before the judge and charged in a while; another said we were disturbing the peace; and still later another explained to me that under Texas law we could be held on "suspicion." One of them asked whether we had been informed of our rights (we hadn't) and then proceeded to give a short statement of our rights. He said that we didn't need to speak if we didn't want to and that we could call a lawyer. We were then asked to answer questions such as name, address, etc., and our possessions were listed. I noticed that as the officer was filling out the form he left blank the space labeled "arresting officer," at which point I asked him to fill it in since I wanted

to know just who had arrested me. He said he didn't know. We were then placed in cells, and waited for what seemed to be about half an hour.

They then took us somewhere to see the Justice of the Peace, A. M. Turland. When there he first asked the accompanying officer whether we had been informed of our rights, the reply from this officer was yes. The Judge then explained that we were charged with disturbing the peace, that this was a misdemeanor with maximum fine of $200 and that we could plead guilty or not guilty. He said that if we pleaded not guilty we would be returned to jail unless we could post bond, which he said was $500. We decided to plead not guilty and wait for someone to bail us out. We were later transferred to Belton and released on bail.

Although I would like to continue my efforts to assist members of the University Committee and others in carrying out the purposes and objectives of the Committee, I have stopped picketing, demonstrating and other non-violent methods of protesting the war in Vietnam because of my experience in Bell County on December 12, 1967. My being arrested, jailed and released on bond have caused me as well as others I know who are not members of the University Committee but who are sympathetic to its purposes and objectives to postpone further expressions of our views through peaceful, non-violent activities lest we be arrested, charged with "disturbing the peace" or something similar, and jailed until we can make bond.

All statements made in the above and foregoing affidavit consisting of five typewritten pages are true and correct.

/s/ ----------

ZIGMUNT W. SMIGAJ, JR.

SUBSCRIBED AND SWORN TO before me by the said Zigmunt W. Smigaj, Jr., this 6th day of February, 1968.

/s/ ----------
Notary Public in and for
Travis County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Title omitted in printing)

AFFIDAVIT IN SUPPORT OF COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this day personally appeared JAMES M. DAMON who after being by me duly sworn did on his oath depose and say:

My name is James M. Damon; I am a resident of Austin, Travis County, Texas, above twenty-one years of age and otherwise competent to make this affidavit and the statements contained therein.

I am a linguist and translator, currently doing doctoral work at the University of Texas at Austin. I am a member of the University Committee to End the War in Viet Nam (University Committee), and was Co-Chairman at the time it was recognized and approved for "new club status" by the University of Texas March 27, 1967.

University Committee is an unincorporated voluntary association composed of young men and women who are residents of Austin and its environs; its purpose is to inform students at the University of Texas on the nature of the war in Viet Nam, and to reach out to thousands of Texans and, with similar organizations, to millions of Americans deeply troubled by the war in Viet Nam, by means of discussions, debates, forums, educational programs, publications (such as Peaceletter 8, Nov.-Dec. 1967, a true and correct copy

of which is attached to this affidavit), demonstrations and non-violent direct action—all in an attempt to bring the war in Viet Nam to a quick non-military end.

It is the policy of the University Committee to demonstrate at every public appearance of members of the Johnson Administration or other "warhawks" which take place within a hundred miles of Austin. I and other members of the University Committee learned of President Johnson's scheduled appearance at Central Texas College about three hours before the dedicatory program was to begin on December 12, 1967. In the short time we had, we notified as many of our committeemen and members as possible and drove to Killeen. I do not know how many made the trip; there were several carloads. Seven made up my immediate party: six men and one woman. We were all neatly dressed and groomed; I was wearing a tie and sports jacket.

The President had already begun speaking when we arrived at the turnoff to the college. As the road to the college was barricaded, we parked our cars on the south side of the highway. This was several hundred yards from the college. The buildings and crowd were hidden from our view by a hill. Carrying our placards, we began walking up the hill in the direction of the college. The first people we met were friendly to us. A group of teenagers waved to us and a Negro serviceman made our picture.

When we reached the top of the hill, east of the campus center, we found the entire area around the grounds filled with soldiers in uniform and civilians. When some soldiers noticed our placards, several came toward us. We continued walking toward them.

We were soon surrounded by soldiers. Some were visibly hostile, others friendly. It seemed they were

already agitated. I believe Zigmunt W. Smigaj, Jr., was the first attacked; a soldier snatched away his placard (a quotation from U Thant, "Vietnam may be the beginning of World War III") and struck him in the mouth. I saw Mr. Ray Reece, an instructor of English who accompanied us, struck to the ground. But not all the soldiers were hostile. I heard one of them shout, "Give him back his placard, it's his right!" My placard was grabbed by a soldier. The placard was a quotation from General Shoup: "Wrong War, Wrong Time, Wrong Place." The soldier who took my placard tried to hit me but was restrained by another soldier. If I am not mistaken he struck the soldier and a struggle ensued between them. At that moment I was seized by three or four MP's and carried out of the crowd, which was quickly dispersed by a large number of MP's.

Along with John E. Morby and Zigmunt W. Smigaj, Jr., I was given over to a group of sheriff's deputies. They handcuffed my hands very tightly behind my back and twisted my arms painfully, making we walk in a low crouched-over position. I assumed I was under arrest, although nobody told me so, and offered no resistance. At no time had I been asked to leave Central Texas College, or desist from demonstrating. I was never given warning that I might be arrested. I noticed that John E. Morby was struggling with his captors and being handled even more roughly than I. A group of women standing near the road shouted obscenities as we walked past.

When we reached the sheriff's car I was pushed against it while the deputies frisked me. As my face was pressed against the hood of the automobile I could hear the President's voice very clearly. He was complaining about the complainers and "agonizers" who

oppose his policies, while I, a college instructor, was being very roughly arrested on the campus of a college.

The deputies were very excited as they forced us into the car. One of them said to the driver: "Get the hell out of here." Another told him to turn on his siren, but it would not work. Traffic was heavy on the highway. We bounced along the shoulder of the road at 50-60 m.p.h.

The deputy behind me had put his fingers inside my collar and was twisting my necktie. I could barely breathe and could not speak. My hands were cuffed behind me; the handcuffs were very tight. I heard John E. Morby ask a deputy to loosen his cuffs. The deputy laughed and said, "Them cuffs wasn't made for comfort, boy." One of the deputies asked, "Where we taking these bastards?"

At Killeen Jail we were frisked twice again. From outside the door came loud guffaws. "If it was twelve years ago we'd know what to do with them," somebody said. We were allowed to make one telephone call each and then locked up. There were two Negroes in the jail, one a veteran of Vietnam who had reenlisted and gotten drunk a couple of days before.

One by one we were taken out, fingerprinted and "mugged." Our "mugger" was a jovial, rotund veteran of 25 years in the Army who liked to talk politics and smiled as he insulted us. To me he said, "They ought to send you guys back to Russia, where you belong." He considered himself an expert on Asia. "You punks don't know a damn thing about China, the more you read the stupider you get," he said. He said the Americans were not fighting Vietnamese in Vietnam, but Chinese. Ho Chi Minh was not Vietnamese, he was Chinese. "I spent 14 years in China, I've seen them Asiatics, I know what I'm talking about." He de-

scribed to me the tortures which Americans and Vietnamese use on each other. "They oughta cut yours off and stuff it down your throat," he said.

We were told to stuff in our shirt tails and comb our hair, then we were taken over to the office of A. M. Turland, Justice of the Peace, to be charged. The JP began by saying that they didn't like traitors around there. He said the most he could charge us with was a misdemeanor, namely "Disturbing the peace." We could plead guilty and pay a $200 fine or else put up $500 bond and await trial. One of us asked if that were not excessive bail. He said, "It is, but I want to make sure you're here for trial." He intended to try the case himself, he said.

Still in the JP's office, I found myself alone in a room with a large gentleman of late middle age. He wore a dark blue suit with a cowboy hat and gold tie clasp in the shape of miniature handcuffs. He was playing with a handful of .38 cartridges. In a fatherly tone he began telling me about himself. He owned a lot of property and paid taxes and had so-and-so many children and so-and-so many grandchildren. He was a good Christian and never missed church. He had been carrying a gun as a lawman for 24 years but had never "shot a man in anger." He had shot a lot of mad dogs and snakes, though. "I could shoot a traitor and never give it a thought—just like shooting a mad dog," he concluded.

We were returned to Killeen Jail, where we spent several more hours. Around 6:00 P.M. we were removed to Belton Jail, after having spent about six hours in Killeen Jail. We were given nothing to eat. We were given a warning by the Chief of Police: "Don't come back here. We don't like your kind. I want you to tell all your University friends. We got all the education we want right here at Killeen Junior College."

At Belton we were fingerprinted and mugged again, but still given nothing to eat. The jailer put us into a cell with three Negroes with the introduction; "I brought you some College Peace Creeps to play with." One of the Negroes was a veteran of Vietnam. He was drunk.

Around 7:00 o'clock our bond was posted by a lawyer from Killeen.

This experience, being arrested, charged, confined and then released on bond, has caused me to cease my efforts to carry out the purposes and objectives of the University Committee by picketing, demonstrating and other similar non-violent activities in or near Killeen and Fort Hood or elsewhere for fear that I will again be charged by Sheriff Lester Gunn or other law enforcement officers for "disturbing the peace" or some such offense and be confined until I can make bond in an amount much more than the maximum fine if I am found guilty. Because of our experience, I know that other members and supporters of the University Committee have also ceased picketing, demonstrating or other non-violent activities protesting the war in Vietnam.

All statements made in the above and foregoing affidavit consisting of five typewritten pages are true and correct.

/s/ ----------
JAMES M. DAMON

SUBSCRIBED AND SWORN TO before me by the said James M. Damon this 7th day of February, 1968.

/s/ ----------
Notary Public in and for
Travis County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Title omitted in printing)

AFFIDAVIT IN SUPPORT OF COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this day personally appeared SANDRA SUE GRANVILLE who after being by me duly sworn did on her oath depose and say:

My name is Sandra Sue Granville; I am a resident of Austin, Travis County, Texas, above twenty-one years of age and otherwise competent to make this affidavit and the statements contained therein.

I am a graduate student at the University of Texas at Austin. While not a formal member of the University Committee to End the War in Viet Nam (University Committee), I am sympathetic to its purposes and objectives and have been an active participant in its affairs. I know there are other students who are not actually members of the University Committee but support its activities and often personally engage in demonstrations and other forms of peaceful protest.

Early Tuesday morning, December 12, 1967, I was informed that President Johnson was scheduled to speak at Fort Hood at 11:00 A.M. and was asked by a member of the University Committee if I would go up there as a part of a protest against the war in Viet Nam. I agreed to do so. Shortly thereafter seven of us gathered at the University YMCA to plan our protest activities. There, for the first time, I learned that the

President was planning to speak at the dedicatory program of Central Texas College near Killeen—not, as I had been informed earlier, at Fort Hood proper. We agreed that from signs, posters and placards already prepared and on hand we should choose those containing what we thought to be the mildest slogans: quotes from former President Eisenhower, General Gavin, U Thant and Ky, himself, plus a "Veterans oppose the war" poster and one stating "Conscience demands we protest the war in Vietnam." We assumed the speech would be an outdoor affair and decided that we would stand quietly in the crowd, trying to place ourselves in the President's line of vision, but that we would not in any way disrupt his speech or interfere with anyone else's right to hear him. With our signs, posters and placards the seven of us drove in two automobiles to Central Texas College.

Of the six men, all except one were clean shaven; three of them wore business suits; one wore a V-necked sweater, shirt and tie; the other two had on winter coats over conservative sports shirts. The only woman, I was dressed in a lady's suit, and was wearing hose, heels, and gloves.

Arriving near the campus of Central Texas College, we parked in spaces against a bank which supported a parking lot. One of the men and I walked to the top of an embankment to see what was happening. Behind the large parking lot area, filled with cars, we saw a sort of natural amphitheater filled by a giant horseshoe of Army parade dress green surrounding a smaller multicolored cluster of persons grouped around a platform. I heard someone announce the President of the United States and the applause that followed. We went back down the slope to get our signs. I selected one without a stick, the "Conscience demands we protest the war in Vietnam," I think.

Going back up the slope I saw four men in sports coats who yelled something that the blowing wind prevented me from hearing clearly. Then I noticed a well-dressed Negro with a camera getting ready to take pictures; I straightened my poster and smiled for him. This pause for picture taking caused our group to get "strung out" and several of us had to rush to catch up with the others.

Nearing the far side of the parking lot I noticed that many soldiers and civilians had turned their attention from the platform and were observing us. The crowd was sparse behind the larger assemblage and many persons at the edges of the main body of listeners seemed to be converging toward us. I heard jeers; a woman shouted, "We don't want your kind here." A man yelled, "Here come the cowards with their signs."

In a split second a soldier ran up and grabbed the poster being held by one of our group, a man named Ray. The soldier ripped the poster in half, broke the stick handle to it and hit Ray on the back of his neck. Another soldier pushed me off balance and grabbed my sign. Someone tore up the sign being carried by Phil, one of the men with me. Another soldier boxed Phil in the right ear and pinned back his arms so that someone else could hit him. While this was happening a soldier shielded me from the action.

An MP with a nightstick grabbed Phil by the arm and hurried him and me through the crowd. I asked him if I might go back and listen to the President's speech; he said that his orders were to get us out of there.

We passed James Damon, who was being held off the ground by five policemen and MP's. His glasses were askew and he was saying, "I'm not resisting. Can't you see? I'm not resisting."

The MP conveying Phil and me took us to a new white police car with three people in it, one of whom was a Bell County deputy sheriff, wearing a miniature pair of gold handcuffs, complete with real chain, as a tie-tack. I asked if it would be possible for us to go back and just listen to the President's speech. He answered, "Well, I guess if you don't carry any more signs or anything it will be all right." Just after he said this, however, I noticed two officers wearing Stetson hats were handling Zigmunt W. Smigaj, Jr., herding him up to a police car. Smigaj was asking, "What crime have I committed? Will you please tell me what law I've broken?" His mouth was bleeding and the left side of his face was swollen. One officer asked, "Should we use the handcuffs?" After searching him, they did snap handcuffs on Smigaj.

Bell County Sheriff Gunn walked up to us and Phil asked, "What are you holding him for?" Phil asked the question several times before getting the answer: "Disturbing the peace. Now you get out of my county and don't you come back." Pointing to the deputy sheriff who had told me that it would be all right to go back and listen to the President's speech, I began to say, "But this man said . . ." and was interrupted by the deputy who said, "Lady, I'm just the deputy. He's the sheriff. You gotta do what he says." The sheriff then repeated, "I don't ever want to see your faces in Bell County again."

Because of what the sheriff said and the way that I and others treated, especially, Damon, Morby and Smigaj who were, of course, arrested, jailed, charged and released only after making $500 bond, I am fearful of engaging in any demonstration or protest activities against the war in Vietnam in Bell County, although Fort Hood is located in that county and is a

fitting place for such activities since many military personnel are transferred from there to Vietnam and many from Vietnam are transferred to Fort Hood. As already indicated, on the morning of Tuesday, December 12, 1967, I was under the impression that our protest would take place at Fort Hood and was perfectly willing to participate in it. Now I am not willing to participate in demonstrations at Fort Hood or elsewhere in Bell County, for the reasons stated. In addition, because of my experience and the treatment of others in Bell County, I have stopped picketing, demonstrating and engaging in other non-violent methods of protesting the war in Vietnam around Killeen until the status of James M. Damon, John E. Morby and Zigmunt W. Smigaj, Jr., has been resolved in court because, while I would like to continue my efforts to assist members of the University Committee and others in carrying out its purposes and objectives, I am fearful that I might be arrested, charged with "disturbing the peace," or something similar, and jailed until I can make bond.

In appearing at Central Texas College on Tuesday, December 12, my only motive and purpose was to attempt to communicate with the President of the United States with a poster expressing a view which my conscience dictates. Neither I nor anyone of the other six participants shoved, hit or called or shouted to any of the members of the crowded audience, nor attempted to do so. From what I saw, none of us initiated any disturbance and, when put upon, none of us defended himself, talked back to the officers or acted in any way that was not polite and peaceful.

All statements made in the above and foregoing affi-

davit consisting of five typewritten pages, including this one, are true and correct.

/s/ ----------
SANDRA SUE GRANVILLE

SUBSCRIBED AND SWORN TO before me by the said Sandra Sue Granville this 13th day of February, 1968.

/s/ ----------
Notary Public in and for
Travis County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Title omitted in printing)

AFFIDAVIT IN SUPPORT OF COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this day personally appeared PHILLIP JUMONVILLE who after being by me duly sworn did on his oath depose and say:

My name is Phillip Jumonville; I reside in Austin, Travis County, Texas. I am nineteen years of age and otherwise competent to make this affidavit.

I am a student at the University of Texas at Austin, and am not a member of the University Committee to End the War in Viet Nam (University Committee).

On December 12, 1967, at about 8:00 A.M., I was informed in a telephone conversation by a member of the University Committee that President Johnson was to speak at Fort Hood, near Killeen, at 11:00 A.M. and some members of University Committee were meeting shortly at the University YMCA to plan a demonstration. At about 9:00 A.M. seven of us gathered at the University Y, where we selected signs and posters from among many kept on hand by the University Committee. My placard contained a quote from former President Eisenhower. Another read: "Viet Nam May Well Be the Initial Phase of WW III—U Thant." Sandra Granville had one saying: "Conscience Demands We Protest the Viet Nam War." We decided and agreed that when we got to the site of

President Johnson's speech we would walk to a place where we could be seen by the President and quietly display our signs and posters. We did not intend to march or picket—just show our placards.

Only one man—he was not later arrested—was *not* clean shaven. Wearing a sports jacket over a plaid shirt, jeans and boots, I was dressed less fashionably than the other five men: John Morby and Zigmunt Smigaj, Jr., wore suits; James Damon, as I recall, was wearing slacks and a shirt under a sweater. Miss Granville chose a conservative suit and had on hose and heels.

Either while still at the "Y" or on the way to Killeen in two cars, we learned that President Johnson was to speak at a dedication at Central Texas College—not Fort Hood as I had been first informed. When we arrived at the college, we found the parking lots full and therefore parked along the road. Between our cars and the site of the speech was a steeply sloping embankment, some fifteen feet in height, and at that level a large parking lot. When we got out of the cars we could not see where the dedication was being made because of the embankment so I climbed the embankment to find out just where we were. Over the tops of the cars I could see a group of buildings and a large crowd. There was a strong wind blowing and I heard snatches of an introduction. I then returned to the cars to get the placard I had selected at the YMCA. Miss Granville accompanied me.

As we walked through the parking lot our group became somewhat separated. When the last car in the parking lot had been passed, I could see that the crowd was composed mainly of soldiers in green dress uniform. Catching up, we were somewhat dismayed by the sight of so many soldiers but decided to go on, to try

to get close enough to the podium so that our signs would be clearly visible to the President.

We walked to the edge of the crowd and without more ado, were attacked. The first attack that I saw was made on Ray Reece. I heard a shout and turned to see a soldier grab Reece's sign, break the stick and use the broken end to hit Reece. At this point I was hit on the ear from behind and my arms held behind me. The soldier holding me then shouted for someone to hit me while he had my arms. Before there was any response I shook him off. He stumbled into the crowd and someone held on to him, to keep him from coming back. A sergeant hurried over and told the soldier to stay where he was. Another enlisted man said to me, "I'm not going to take any of this ——. I've got buddies in Viet Nam." I replied that I had a cousin there.

Before I could say anything more, an MP came up and hustled me and Sandra Granville, who had been protected from the melee by a soldier, out of the crowd. I asked the MP by what authority was he moving us, and he replied that his orders were to get us out of the crowd. We went along with him.

As we reached the edge of the crowd, I saw James Damon being held off the ground by five peace officers. He kept repeating, "I'm not resisting. Can't you see I'm not resisting." At the time I saw him, he was not resisting. I then saw a group of policemen clustered around a police car. I asked the MP if we could find out if one of our friends was in trouble. He made no objection, so Miss Granville and I walked toward the police car. We had not yet reached the car when Zigmunt Smigaj, Jr. was hustled past us by a policeman in a helmet. Smigaj's hands were handcuffed behind his back and he was bleeding from the mouth. Smigaj

kept repeating, "What laws have I broken? Would you please tell me what crime I have committed?"

By the time we reached the police car Smigaj and Morby were inside. We were talking to a deputy sheriff when Mr. Damon was brought over. We asked the deputy if we could return to hear the remainder of the speech and he replied that we could if we carried no signs and caused no disturbance. Just then Sheriff Gunn arrived and told us to get out of Bell County and never come back. When I countered with the statement just made by the deputy, the deputy cut me off saying, "He's the sheriff. You've got to do what he says." During this interchange, Reece arrived. As the three of us walked to Reece's car, I asked the sheriff what Smigaj, Damon, and Morby were charged with. After several repetitions, he replied, "Disturbing the peace."

Since December 12, 1967, I have not participated in any public activities of the University Committee at Fort Hood or anywhere in Bell County because of Sheriff Gunn's admonition that we stay out of Bell County and what he and his deputies did in charging Morby, Damon and Smigaj with "disturbing the peace." I know from what I personally saw and heard that Morby, Damon and Smigaj did not say or do anything at all other than to walk up to the rear of the assembled crowd carrying signs and placards, when and where they were attacked and assaulted. If they can be charged with "disturbing the peace" for that, so can I by Sheriff Gunn or other law officers and be required to go to jail or make bond. I don't want that to happen to me, so I just do not demonstrate in Bell County and will not until their cases are finally decided.

All statements made in the above and foregoing affi-

davit consisting of four typewritten pages, including this one, are true and correct.

/s/ ----------
PHILLIP JUMONVILLE

SUBSCRIBED AND SWORN TO before me by the said Phillip Jumonville this 13th day of February, 1968.

/s/ ----------
Notary Public in and for
Travis County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Title omitted in printing)

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

STATE OF TEXAS)
COUNTY OF BELL)

BEFORE ME, the undersigned authority, on this day personally appeared MARION W. CONDITT who after being by me duly sworn did on his oath depose and say:

My name is Marion W. Conditt; I am a resident of Temple, Bell County, Texas, above twenty-one years of age and otherwise competent to make this affidavit and the statements contained therein.

I am a Doctor of Theology and a Minister. I am married and have a family.

On the morning of December 12, 1967, after learning that President Lyndon B. Johnson would appear and speak at the dedicatory program at Central Texas College near Killeen, my wife and I made a quick decision to hear the President speak. With our two youngest children my wife and I drove from Temple to the area of Central Texas College near where the dedicatory program was being held.

We arrived a few minutes after the President had begun to speak. We parked our car in a designated area near the College and walked to a street that divided the parking area from an area, east of the College, where the crowd was standing. Our own location was on a slightly raised elevation from which we could ob-

serve the speaker's stand, the crowd that stood on that side of the buildings, and the parking lot.

In a brief time after we took our place near the curb of this street, my wife and I noticed two or three men walking toward the crowd carrying cardboard signs. Several other persons followed them from the parking area. Their conduct was casual and relaxed and did not attract any attention until they began to approach the body of the audience in front of us. As they walked toward the rear of this massed group, that was facing the other way, several members of the audience that were standing in small groups at the rear began to follow them. We heard some jeers and whistles from the people standing in our area and a woman with a child shouted, "Get 'em."

As the persons carrying the signs, who had passed by us coming from the parking lot, entered into the crowd we observed a disturbance as some of the crowd that was following them caught up with the group of persons. I was not able to see clearly what took place in the commotion that ensued but then I did see law enforcement officers lead three men from the crowd and search them as the men stood beside a police car. These men attempted to point back at the crowd, but they were forcibly escorted to two cars that were parked a short distance away. The arm of one man was pinned behind his back as he attempted to speak to a cameraman. Then the three men were placed in cars and driven away.

Neither my wife nor I left our position at the edge of the crowd. We did not know nor recognize any of the participants in these occurrences except, of course, the President of the United States of America.

All statements made in the above and foregoing affi-

davit consisting of two typewritten pages are true and correct.

/s/ ----------
MARION W. CONDITT

SUBSCRIBED AND SWORN TO before me by the said Marion W. Conditt this 6th day of February, 1968.

/s/ ----------
Notary Public in and for
Bell County, Texas

THE STATE OF TEXAS
COUNTY OF BELL

AFFIDAVIT

I, LESTER GUNN, swear:

I am Sheriff of Bell County, Texas, and have held that office for several years.

On December 12, 1967, President Lyndon B. Johnson spoke at the dedication of Central Texas College, which is between Killeen and Copperas Cove, Texas. The Secret Service asked that the Bell County Sheriff's Department assist in maintaining order and security on that occasion. (We had attended a meeting with other officers which was conducted by the Secret Service, and at which various assignments were given.) At about 11 o'clock a.m. during the ceremonies and while the President was speaking, I was standing on the steps of the speaker's platform, when a policeman from Killeen came by and told me that it looked like there was some trouble over on the edge of the crowd. I looked in that direction and saw the crowd over there surging in a direction toward the edge of the crowd. Sheriff Cummings of Coryell County and the Chief of Police of Copperas Cove and I went over there but by the time I got there, a car was driving off which I understand contained at least two of the people against whom complaints were later filed.

There were three other people—two men and a woman—who apparently were friends of the people who had been carried off, and they were advised that it would be best if they left. The crowd around them was composed principally of soldiers in uniform and I considered it a dangerous situation. They started going to their car, which was on the Highway, and I

and some other officers walked behind them, staying between them and the crowd, which followed. I remember one of the soldiers in particular, a large Sergeant, who kept saying things like "Let me have them SOBs; they never saw no blood."

I did not have the names of any witnesses but was told that they had gotten into a squabble with some soldiers and Military Police and had refused to leave; and that one of them had either yelled or had a sign saying something to the effect that "Hitler's better than this," or "I like Hitler better."

I had first understood that the incident happened on Coryell County but on my way back to Belton after the dedication was completed, my Deputy Frank Strange called me and said that it had happened in Bell County and I told him to go ahead and file a disturbance complaint. I told him that believing that the facts justified filing such a complaint.

I did not actually see the three persons who had been arrested until they were brought to my office at the Bell County jail around 5:30 p.m. that afternoon. I remember that Huntley Brinkley was telecasting the President's speech while they were there. One of them phoned someone in Austin from the office and another either talked to the same person or said "talk to him for me too" or something to that effect. We have a record of the call. They did not ask to make other calls. We would have permitted them to do so.

While they were going through the procedure of fingerprinting, etc. at the jail, the President's speech at the college was being shown on the telecast and they were laughing and making remarks which I could not hear very well but one of them said something about

"that grey headed fellow" and that we "needed a President who knows what he's doing."

One of them said that a soldier had hit him in the mouth and knocked him down. At no time did I lay a hand on the men or mistreat them by word or deed, and to the best of my knowledge and belief, none of my officers did so.

Two of the men said that they were lucky to get out of the affair at the college without being killed and that they ought to have had better sense than to have gone out there.

Davis Bragg, a lawyer from Killeen, called and said he was coming down to make their bond.

After they had been booked one of them said that he would not go up to the jail without being fed. They were told that we did not feed supper. They bought some candy bars. I told them that we did not want any more trouble; to be peaceable; that a lawyer was on his way to get them out.

No prisoner has died in my jail in the over three years that I have been Sheriff.

Mr. Bragg did come down and make their bond and they were released. I do not believe that more than an hour passed from the time they got to the jail building until they were released, and they were only locked up there a very short period of time.

At no time did I ever tell them to stay out of Bell County, or make any remarks about their being traitors, and I have no knowledge of any of my deputies having done so. I instructed my officers to give them their rights. I treated them courteously and said very little to them, only saying whatever was necessary in the usual performance of my duties.

It is my firm opinion that the prompt action of the Military Police and such other officers as were present was responsible for saving these men from possible very severe injury at the hands of some of the crowd at the dedication.

Signed February 22, 1968.

LESTER GUNN

Sworn to and subscribed before me by Lester Gunn this the 22nd day of February, A.D. 1968, to certify which witness my hand and seal of office.

BOBBIE KELLY
Notary Public, Bell County, Texas

THE STATE OF TEXAS
COUNTY OF BELL

AFFIDAVIT

I, DALE FLETCHER, swear:

I was a deputy sheriff of Bell County on December 12, 1967, and was present and on duty when the President spoke at Central Texas College on that date.

I was standing on an embankment near the speaker's stand when there was a commotion near the rear of the crowd, and a bunch of people milling around all of a sudden. Paul Butler and I started running back there. I cut through the crowd and came up to where a Killeen policeman had hold of one man who was struggling with him, and one or two M.P.s had another man.

As I had run there, I had hollered to Don Threatt, a game warden, to come on and he had followed me.

Don and I held the man who was struggling with the policeman while somebody put handcuffs on him.

I don't know who any of these officers or MPs were at this time.

No one of us struck him, but we just exercised enough restraint on him to enable the handcuffs to be put on him.

I did not know at that time what had occurred before we got there but the only thing evident was that the officers and Military Police were having trouble with the men and we came to their assistance.

The man we helped with had been hit in the mouth, he said by a soldier.

When we got to the car, the nearest car was a fish

and game commission car so we got into it. Two of us were in the back seat with one of the handcuffed men between us, and the other two men who were handcuffed were in the front seat with the driver.

We took the men to the Killeen police station and turned them over to the Killeen authorities while we went back out to the dedication site.

DALE FLETCHER

Sworn to and subscribed before me by Dale Fletcher this the 22nd day of February, A.D. 1968, to certify which witness my hand and seal of office.

DOROTHY GOSS
Notary Public, Bell County, Texas

THE STATE OF TEXAS
COUNTY OF BELL

AFFIDAVIT

I, PAUL BUTLER, swear:

I am a Deputy Sheriff of Bell County, Texas, and was such a Deputy on December 12, 1967, at the time President Lyndon B. Johnson spoke at the Central Texas College dedication.

I was present and on duty at the speaking. The Secret Service had asked us to help keep order. The speaker's platform was on a rise, and I was on the bank of the rise about 40 or 50 feet east of the President watching the crowd. Deputy Sheriff Dale Fletcher was nearby and doing the same thing. An M.P. came up to me and said "they're having some trouble over there," and indicated. I ran and got Deputy Fletcher and we saw a milling crowd, with the white helmets of the Military Police and of the Killeen Police in the middle of it. It was on the east edge of the crowd. Mr. Fletcher and I ran around the crowd rather than through it, staying on the road, and when we got nearer the site, Mr. Fletcher, who was behind me, must have cut through because he got there before I did. I could hear shouting and movement of the mass of the crowd, with the Killeen Police and M.P.s intermingled with the crowd and a mass of soldiers in blue uniforms converging on the spot. I saw the M.P.s work their way toward the edge of the crowd toward the rear, and when I got down there Dale Fletcher and Don Thweatt, the game warden, were already there. Some M.P.s and other officers were there also. I followed as two of the handcuffed men against whom complaints were later filed, were led to a car. I did not see the third man get in the car. The crowd was hol-

lering things like, "Let us have them," "boo," "don't run 'em off, Sheriff, we'll take care of them." There was also cursing.

So far as I can recall, I saw only two of the men against whom complaints were filed at that time, although I may have seen the other one without identifying him. The two I saw were led to a car on the parking lot. They were standing up, and the officers merely had hold of them by the arm. The two men kept turning around in the direction of the crowd and saying something over their shoulders, but I don't know what they were saying. I got between them and the crowd. Three people, one of whom was a woman, came from the crowd and made remarks such as "stop," "where are you taking them," "what's wrong," "we want to talk to them," or words of that nature.

One man was put in the back seat of the car and the other one in the front seat. I don't know whether the third man was in that car or not.

The three other people I mentioned came up and one edged in front like he was going to step in front of the car. The car was going very slow and cut to the left. They asked where the car was going, and I said I assumed to Killeen, and they said they had to talk to them, and said things like "isn't this great, this is a fine way to be treated."

By that time, Sheriff Gunn and Sheriff Cummings, and others, had come up, and we told them that it would be best if they left, so they went to their car on the highway while we followed, staying between them and the crowd, which was hostile and following.

The two men I saw were not frisked at the car or

at any other time while I saw them. They were put directly into the car.

Later I tried to find the placards but they had been torn to shreds.

Fletcher and Thweatt came back shortly and it is my understanding that they turned the men over to the Killeen authorities and came right back. They had some handcuffs and were trying to find the owners. I believe they had at least two sets of handcuffs, one of which was plainly military, and I think the other set was probably a City of Killeen set. I assume they were the handcuffs with which the men had been handcuffed.

I next saw the men about 5:30 P.M. that evening at the jail, when they were booked. Attorney Davis Bragg got them out on bond a little later in the evening.

At no time did any officer ever hit or mistreat them in my presence, and at no time did I do so. At no time was I discourteous to them. At no time was the Sheriff discourteous to them in my presence.

Signed February 22, 1968.

PAUL BUTLER

SWORN TO AND SUBSCRIBED before me by the said PAUL BUTLER, this the 22nd day of February, A.D. 1968, to certify which witness my hand and seal of office.

(L.S.)

BOBBIE KELLY
Notary Public in and for
Bell County, Texas.

THE STATE OF TEXAS
COUNTY OF BELL

AFFIDAVIT

I, FRANK STRANGE, swear:

I am a deputy sheriff of Bell County, Texas, and was such a deputy on February 12, 1967. I attended the dedication of Central Texas College when the President spoke. The Secret Service had asked a number of us to attend and assist.

I heard the noise of shouting and was told by an M.P. Captain who ran up that he believed they were having some trouble. I saw placards go up and come down. I ran over to the scene of the trouble but the men were already being driven away.

I went to the police station with one of the Coryell officers. When we got there, we were told that the matter had happened in Bell County and I radioed Sheriff Lester Gunn and so advised him, and he told me to go ahead and file complaints for disturbing the peace, which I did.

The men made some phone calls from the Justice of Peace office.

I never mistreated the men in any way.

Signed February 22, 1968.

FRANK STRANGE

Sworn to and subscribed before me by Frank Strange this 22nd day of February, 1968, to certify which witness my hand and seal of office.

DOROTHY GOSS
Notary Public, Bell County, Texas

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. 67-63-W

UNIVERSITY COMMITTE TO END THE WAR IN VIET NAM, JAMES M. DAMON, JOHN E. MORBY and ZIGMUNT W. SMIGAJ, JR.,

vs.

LESTER GUNN, Sheriff of Bell County, Texas; A. M. TURLAND, Justice of the Peace, Bell County, Texas, Precinct No. 4; JOHN T. COX, County Attorney, Bell County, Texas

FOR PLAINTIFFS: SAM HOUSTON CLINTON, JR., Austin, Texas.

FOR DEFENDANTS: HOWARD FENDER, Assistant Attorney General of Texas, Austin, Texas.

BEFORE: HOMER THORNBERRY, Circuit Judge, ADRIAN A. SPEARS, Chief Judge and JACK ROBERTS, District Judge

PER CURIAM: The University Committee to End the War in Viet Nam is an un-incorporated voluntary association composed of young men and women who are residents of Austin, Texas, and its environs. The purpose of the University Committee is to protest the conduct of the war in Viet Nam by means of discussions, publications, demonstrations, and non-violent direct action, in an attempt to bring the war in Viet Nam to a quick non-military end. The individual plaintiffs include both members of the University Committee and persons sympathetic to its purposes who participate in its affairs. The defendants are duly elected officials of Bell County, Texas.

During Monday, December 11, 1967, and the morning of Tuesday, December 12, 1967, various news media in the Central Texas area reported that The President of the United States was to appear and speak at a dedicatory program at Central Texas College. Central Texas College is situated near Killeen, Bell County, Texas. Killeen is a city of some 30,000 population and serves nearby Fort Hood, a large United States military establishment, reported to be the largest United States armored post. Fort Hood has a population of about 35,000 soldiers and an equal number of civilian dependents. From Fort Hood military members of armed units of the United States Army are transferred to Viet Nam and from Viet Nam many veterans of military service there are transferred to Fort Hood. The President of the United States was also scheduled to make an inspection of Fort Hood on December 12, 1967. Accompanying the President and his official party on the occasion of his appearance at Central Texas College was the usual corps of so-called White House press correspondents, and other representatives of the news media including television commentators and cameramen. Some 25,000 military personnel, their dependents, and civilians from in and around the central Texas area were assembled to hear the President of the United States and other speakers on the dedicatory program.

The evidence indicates that the members of the University Committee learned of the President's scheduled appearance on the morning of December 12, about three hours before the program was to begin. As many Committee members and interested parties as possible were notified, and several carloads of persons desiring to attend the President's speech drove to Killeen. The President had begun speaking when the group, which

included the individual plaintiffs, arrived at the turn-off to the college. They parked the car some distance from the speaking area at the college. After choosing placards and signs, the group began walking in the direction of the college. The first people that the group met were friendly, waving and taking pictures of the group with their signs. They then came upon the main speaking grounds which were filled with soldiers in uniform and civilians.[1]

The group soon was surrounded by soldiers, some friendly, some hostile. Several of the group were attacked by soldiers, who snatched away the placards and physically struck several persons in the group. At that point, several military police siezed members of the group and carried them out of the crowd. They were taken to sheriff's deputies. After being handcuffed and frisked, three were taken to the Killeen, Bell County Jail. Apparently there was some disagreement as to whether the incident had occurred on prop-

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[1]The signs used by the group were neither abusive nor obscene. Thereon were printed such slogans as "I Have but One Idol—Hitler. 'General Ky';" "The War in Vietnam May be the Initial Phase of World War III. 'U Thant';" and "Wrong War, Wrong Time, Wrong Place. 'General Shoup'." However, members of the group knew that many of the servicemen were Viet Nam veterans; that the tremendous crowd at Fort Hood had peaceably assembled to hear their Commander-in-Chief; and that any untoward incident would likely cause the police, military and civilian, to react quickly to safeguard the President of the United States. As the group moved nearer to where the President was speaking, the epithets became angrier, and the general atmosphere of hostility was more pronounced. One member of the group stated that he had been dismayed at the sight of so many soldiers, but decided to proceed anyway. All of this, of course, lends credence to the argument that plaintiffs should have foreseen that a continuation of their protest, under the circumstances, would, in reasonable probability, provoke a disturbance, and possibly even end up in violence. See Feiner v. New York, 340 U.S. 315. But in our disposition of this case we do not reach and, therefore, do not decide this issue.

erty lying in Coryell County or on property within Bell County. When the decision was reached that the incident was within the jurisdiction of the Bell County authorities, complaints were filed against the three men, charging the offense of disturbing the peace. Although the maximum punishment under the Texas "Disturbing the Peace" statute, *Tex. Pen Code Ann.*, Art. 474 (1952) is a fine of $200, the Bell County Justice of the Peace set bail for each of the men at $500.

This suit, seeking interlocutory and permanent injunctions and a declaratory judgment, was filed on December 21, 1967. Subsequently, on February 13, 1968, the criminal charges in Bell County were dismissed, on the County Attorney's motion; the reason recited for the dismissal was that the alleged offenses had occurred on a federal enclave, to which criminal jurisdiction had been ceded by the State of Texas.

-I-

The dismissal of the criminal charges in Bell County caused the defendants in the present action to move this Court to dismiss this action for lack of jurisdiction. Defendants contend that the case is now moot for the reason that "no useful purpose could now be served by the granting of an injunction to prevent the prosecution of these suits because same no longer exists." It appears, in other words, that defendants' motion to dismiss is addressed to that part of the plaintiffs' complaint which seeks an injunction against the prosecution of the criminal charges in Bell County. We are clear that that part of plaintiffs' prayer is no longer before us. But we cannot fail to understand that, just as in *Dombrowski v. Pfister,* 380 U.S. 479, 483-492 (1965) and *Zwickler v. Koota,* 389 U.S. 241, 253-254 (1967), more is involved where the prayer for

relief also requests a declaratory judgment that the statute under which the criminal charges were brought is unconstitutional on its face for being overly broad. The dispositive question at this point then is whether the additional prayer defeats the defendants' argument that this Court is presently without jurisdiction to determine the merits of the case.

Any discussion of plaintiffs' standing in this regard must begin with a consideration of *Dombroski v. Pfister, supra.* In that case the appellants brought suit for injunctive and declaratory relief to restrain the prosecution or threatening of prosecution under Louisiana's Subversive Activities law, which they alleged violated their rights of free expression. A three-judge court dismissed the complaint, holding that there was involved a proper case for abstention pending possible future narrowing of the state statute by state courts. The Supreme Court reversed, holding the abstention doctrine (i.e. waiting for a state court to clarify the state statute) inapplicable. The following language bears on our determination:

> When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. . . . For '*(t)he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . .*' Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. . . . For example, we have consistently allowed attacks on overly broad statutes with no requirement that the per-

son making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. . . . We have fashioned this exception to the usual rules governing standing . . . because of the '. . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. (Emphasis added.)

380 U.S. at 486-487. The Court then drew its conclusion, containing the now famous metaphor: "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." 380 U.S. at 487. Indeed the Court went even further: "So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." 380 U.S. at 494.

The same kind of notion had been voiced earlier by the Fifth Circuit in *Baldwin v. Morgan,* 251 F.2d 780 (5th Cir. 1958). There a group of Negroes had brought a class action for injunction and declaratory relief against compulsory segregation in railroad waiting rooms. State charges had been filed against the Negroes but were dismissed because only the offending railroad or bus line could be criminally punished under the law. The Fifth Circuit held that the fact that criminal charges had been dismissed as against these particular plaintiffs did not bar the federal action:

> When the criminal proceeding was closed, it did not automatically take with it the charge made in this cause that state agencies, pretending to act for the state and exerting the power of their respective offices were, under the threat of arrest or

other means, depriving Negroes of the right to be free of discrimination in railway public waiting rooms on account of race or color. (Emphasis added.)

251 F.2d at 787.

More recently, in *Carmichael v. Allen,* 267 F.Supp. 985 (N.D. Ga. 1967), a three-judge court had occasion to consider the mootness contention. Among other charges against the appellant was one charging him with violation of the Georgia statute on inciting insurrections. The state Solicitor General had disavowed any intention to prosecute under that statute for the acts already done. In the following language the three-judge court granted an injunction prohibiting future prosecutions under the insurrection law:

> Although the Solicitor General, defendant in this case, disavows any intention of presenting a proposed bill of indictment against any of these plaintiff or nay others for acts arising out of (the past events), or otherwise to seek prosecution for such acts under these insurrection statutes, neither Mr. Slaton nor any other representative of the state of Georgia has disavowed any further intention to use these statutes in the future. It is hardly necessary to point out the 'chilling' effect upon the exercise of the freedom of speech and assembly of a statute prescribing punishment by electrocution if a person, conscientiously seeking to exercise these rights, must pattern his speech with the ever present threat of such a sanction.

267 F.Supp. 994.

Is there then the requisite "chilling effect" here? The sworn evidence in support of the plaintiffs' prayer for relief indicates that these men have ceased efforts to carry out the purposes and objectives of the University Committee for fear of sanctions under the stat-

ute which is presently attacked, that they have "postponed further expression of (their) views through peaceful, non-violent activities lest (they) be arrested" for disturbing the peace. This in itself demonstrates a broad curtailment of activities which may include, and (as discussed in Part II) do include, protected behavior. Not only, as in *Carmichael, supra* at 994, can the presence of this statute cause a person to "pattern his speech with the ever present threat" of sanctions; here, it appears to have induced suspension of expression altogether.

With this background, how then do we evaluate the defendants' argument that inasmuch as the state charges have been dismissed, the record is bare, there is no "case or controversy," there is nothing useful which can be accomplished. Of course, it ignores the reality that plaintiffs' prayer includes the request for a declaration that the statute is unconstitutional on its face. It ignores the notion, introduced in *Dombrowski* and reiterated in *Carmichael,* that the statute's simple presence on the books (which is what the plaintiffs are attacking) may have the requisite "chilling effect" on constitutionally protected behavior to warrant close judicial scrutiny. It even ignores that at least twice in the area of First Amendment Rights, the United States Supreme Court has felt compelled to decide the constitutionality of state statutes where no state criminal charges thereunder were pending.[9] We therefore overrule Defendant's Motion to Dismiss, and proceed to a consideration of the merits.

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[9] *Dombrowski, supra,* and *Baggett v. Bullitt,* 377 U.S. 360 (1964), as to the 1931 state loyalty oath. In addition, there was the determination of unconstitutionality after the disavowal of prosecution found in *Carmichael.*

- II -

Before we discuss the issues presented as to the merits of this controversy, it may be wise to state what is not involved. This case does not involve in any way an appraisal of the constitutionality of the application of the statute to the plaintiffs; we do not evaluate whether Article 474 was constitutionally applied to these plaintiffs' activities. Our sole concern is the determination of whether Article 474 on its face is, as plaintiffs argue, constitutionally defective as being overly broad.

Article 474 provides:

> Whoever shall go into or near any public place, or into or near any private house, and shall use loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or yell or shriek or expose his or her person to another person of the age of sixteen (16) years or over, or rudely display any pistol or deadly weapon, in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200).

Our inquiry deals with the overbreadth attack as it relates to the part of the statute which prohibits the use of "loud and vociferous . . . language . . . in a manner calculated to disturb the person or persons present." Does that part of the statute

> offend the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'

Zwickler v. Koota, 389 U.S. at 250.

The United States Supreme Court some years ago

in *Cantwell v. Connecticut,* 310 U.S. 296 (1940), outlined in broad terms the legitimate thrust of the breach of the peace offense:

> When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.

310 U.S. at 308. The Court vacated Cantwell's conviction because there had been no showing of violent or truculent conduct or assault or threatening of bodily harm.

In *Terminiello v. City of Chicago,* 337 U.S. 1 (1949), the petitioner was convicted for violation of a disorderly conduct ordinance. The trial court had charged that "the misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance. . . ." The Court struck down the conviction, saying

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . . is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.* (Emphasis added.)

337 U.S. at 4.

The Supreme Court, in *Edwards v. South Carolina,* 372 U.S. 229 (1963), had before it a state statute, which, like *Terminiello,* permitted conviction if the speech "stirred people to anger, invited public dispute, or brought about a condition of unrest." 372 U.S. at 238. The evidence was that the petitioner had engaged in conduct which was boisterous, loud, and flamboyant. 372 U.S. at 233. The Court struck down the conviction, utilizing the *Terminiello* reasoning. An Atlanta city ordinance, prohibiting disorderly conduct, came under similar condemnation in *Carmichael v. Allen, supra.* The ordinance prohibited acting "in a boisterous manner." The three-judge court declared the ordinance unconstitutional as an unwarranted restriction of First Amendment Rights.

Texas Article 474 suffers the same constitutional infirmity. It cannot be doubted that the provision regarding the use of loud and vociferous language would, on its face, prohibit speech which would stir the public to anger, would invite dispute, would bring about a condition of unrest, or would create a disturbance. In so doing, the statute on its face makes a crime out of what is protected First Amendment activity. This is impermissible.

The Texas statute is subject to attack for still another reason. As pointed out earlier, Article 474 prohibits the use of "loud and vociferous language . . . *in a manner calculated to disturb*" the public. (Emphasis added.) Similar provisions have been subject to judicial scrutiny in *Cantwell v. Connecticut,* 310 U.S. at 308; *Ashton v. Kentucky,* 384 U.S. 195, 200 (1966); *Carmichael v. Allen,* 267 F.Supp. at 998-999; and *Baker v. Bindner,* 274 F.Supp. 658, 662-663 (1967). Despite the defendants' contention that the language of Article 474 is significantly different from those ex-

amined in the above cases, it is our opinion that Article 474 must be added to the list of statutes which "leave to the executive and judicial branches too wide a discretion in the application of the law." It "leaves wide open the standard of responsibility," relying on "calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments per se." For this additional reason, Article 474 is vulnerable to constitutional attack.

The case which appears to present question closest to our own is *Thomas v. City of Danville,* 207 Va. 656, 152 S.E. 2d 265 (1967). There the petitioners were appealing on constitutional grounds a restraining order issued by the local corporation court. Among other things the order restrained the petitioners:

> (4) From creating *unnecessarily loud,* objectionable, offensive and insulting noises, *which are designed to upset the peace and tranquility of the community;* and
>
> (5) From engaging in any act in a violent and tumultous manner or holding unlawful assemblies *such as to unreasonably disturb or alarm the public.* (Emphasis added.)

Because of the modifying language in the order, the scope of the restraint there was narrower than under the Texas statute. However, the Supreme Court of Appeals of Virginia had no difficulty in striking down the above parts of the order, doing so on *Terminiello* grounds.

We reach the conclusion that Article 474 is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of Article 474 as now worded, insofar as

it may affect rights guaranteed under the First Amendment. However, it is the Order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements.

Signed at Austin, Texas this 9th day of April. 1968.

HOMER THORNBERRY
United States Circuit Judge

ADRIAN A. SPEARS
Chief Judge, United States District Court

JACK ROBERTS
United States District Judge

CIVIL ACTION NO. 67-63-W

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
WACO DIVISION

* * *

(Title omitted in printing)

* * *

DEFENDANT'S MOTION FOR NEW TRIAL

* * *

TO THE HONORABLE JUDGE OF SAID COURT:

Come now Lester Gunn, A. M. Turland, and John T. Cox, Defendants in the above styled and numbered cause, appearing by and through the Attorney General of Texas, and pursuant to Rule 59 of the Federal Rules of Civil Procedure file this their Motion for a New Trial. Defendants urge that a new trial be granted for each and every of the reasons set forth below.

I.

The Defendants urge that this Court lacks jurisdiction to enter the Order and Judgment contained in the Per Curiam Opinion of the Court signed on the 9th day of April, 1968, and filed on the 10th day of April, 1968.

Section 2284 of Title 28 of the United States Code Annotated sets up the composition and procedure for a hearing by a three-judge federal court. Subdivision (2) states:

"(2) If the action involves the enforcement, operation or execution of state statutes or state ad-

ministrative orders, at least five days notice of the hearing shall be given to the Governor and Attorney General of the state."

Nowhere among the papers of the cause does there appear any certificate of service or notice of any kind upon the Governor of Texas. Counsel for Defendants has been reliably informed by the Administrative Assistant to the Governor of Texas that no such notice was ever received by the Governor of Texas.

In Cyclopedia of Federal Procedure, Third Edition, 1965 Revised Volume, in Volume 14a at page 342 in Section 73.107 under the heading Notice of Hearing the following appears:

"If the action involves the enforcement, operation or execution of a state statute or administrative order, at least five days' notice of the hearing shall be given to the governor and attorney general of the State. This notice is jurisdictional."

Cited as authority for the foregoing is *Crescent Manufacturing Company v. Wilson,* 242 F. 462. In the *Crescent* case at page 464 the following appears:

"When application for the injunction was presented to the District Judge it was incumbent upon him to call to his assistance two other judges, one of whom should be a Justice of the Supreme Court or a Circuit Judge, to hear and determine the application. And it was also his duty to give notice of the hearing to the Governor and Attorney General, as well as to such other persons as may be defendants in the suit."

Furthermore, in *Arneson v. Denny, et al.,* 25 F.2d 993 the question was raised even after certain notice had been given to both the Governor and the Attorney General of the State of Washington. There the Court held that not only must some notice be given but that the

Governor should be informed of the particular law of the State of Washington, enforcement of which was sought to be enjoined, of the particular official acts sought to be enjoined, upon what grounds such law was claimed to be unconstitutional, and the time when the Defendants would be served with copies of the court's order, complaint, and motion. At Page 995 of the *Arneson* Opinion the following language appears:

> "It may be that the Attorney General has waived any defect in the notice, but the question remains as to the sufficiency of the notice served upon the Governor."

Defendants do not now question that in the instant case the Court had authority and jurisdiction to hear and determine Defendant's Motion to Dismiss by reason of the cause having become moot. And since the Court specifically did not pass upon whether or not the Defendants applied the state statute in question in a constitutional manner, Defendants do not hear comment on whether or not this Court had the jurisdiction and authority to make such determination. But Defendants do strongly urge that without appropriate notice to the Governor of Texas this Court had no jurisdiction to hear and determine the constitutionality of Article 474 of the Penal Code of Texas or any other state statute.

II.

Defendants urge that the Court's ruling on the Defendant's Motion to Dismiss for reason of mootness is contrary to the law and the facts.

The Court bottoms its decision on the case of *Dombroski v. Pfister,* 380 U.S. 479. Defendants urge that an examination of the application of the law and the facts in *Dombroski* clearly reveals the absolute dif-

ference between the instant case and *Dombroski.* In *Dombroski* there was a clearly shown intent on the part of the Louisiana officials to harass the Plaintiffs by undertaking the prosecutions and seizures without regard to the possibility of success. In the instant case, there is no showing of any method, intent or design whereby the named Defendants or other officials similarly situated throughout the state of Texas would undertake to harass the Plaintiffs or others similarly situated.

In *Dombroski* the court found that a certain section was invalid because it created an offense of failure to register as a member of a Communist front organization and defined such an organization as one that had been officially cited or identified by the Attorney General of the United States, Subversive Activities Control Board of the United States or any committee or a subcommittee of the United States Congress as a Communist front organization and said that such would create a presumption that the organization was subversive. Then the court went on to say at Page 496:

> "A designation resting on such safeguards is a minimum requirement to insure the rationality of the presumptions of the Louisiana statute and, in its absence, the presumptions cast an impermissible burden upon the appellants to show that the organizations are not Communist fronts. 'Where the transcendent value of speech is involved, due process certainly requires . . . that the state bear the burden of persuasion to show that the appellants engaged in criminal speech.' Speiser v. Randall, 357 U.S. 513, at 526. It follows that § 364 (7), resting on the invalid presumption, is unconstitutional on its face."

Article 474 of the Penal Code shows on its face (and when taken in connection with Texas procedure gen-

erally) that the burden of proof remains with the state to prove the criminal activity where any charge is made of violation of that statute.

In *Dombroski* it was shown that the purpose of enforcement of the statute was to harass and discourage people asserting and attempting to vindicate their constitutional rights. In Article 474, the only specific prohibition as to content is that people shall not use obscene, vulgar or indecent language or swear or curse and this only when done in the presence of those to whom such unseemly conduct would be offensive. There is no prohibition of freedom of expression.

This Court then went on to quote from *Dombroski* the now famous metaphor:

> "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."

But nowhere in the record or in the court's opinion is there any showing of where the First Amendment right of freedom of speech is affected by Article 474 or by the facts surrounding the arrests in the instant case.

This Court then went on to discuss *Baldwin v. Morgan,* 251 F.2d 780 but overlooked the fact that in its own quotation in its opinion there was a showing of a continuing threat of arrest or enforcement by other means which would deprive Negroes of a right that had been declared to be theirs by the Supreme Court of the United States. It is again emphasized that there is no showing of any such threat in the instant case.

Next, this Court undertakes to discuss *Carmichael v. Allen,* 267 F.Supp. 985. Defendants would like to call to the Courts attention that their statement near

the bottom of Page 5 of the opinion is in conflict with the reported case. This Court say that Carmichael was charged with the violation of the Georgia Statute on inciting insurrections. The reported case shows that he was charged under an entirely different statute for "riot." The case does show that several prosecutions were pending under Section 904 of the statute of inciting insurrections and that Section 902 had been theretofore declared by the United States Supreme Court to be unconstitutional.

The Court in *Carmichael* then went on to show that there were currently pending against Carmichael charges under the Georgia Riot Statute. The Court then went on to say at Page 996:

> "In view of this limitation on the application of the doctrine, it seems clear that we need not construe the Georgia Riot Statute in order to ascertain whether it may ultimately be held unconstitutional for vagueness. This follows because this statute speaks only in terms of *violent and tumultuous conduct.* (Emphasis in the opinion) It does not speak in terms of expression, nor in terms of '*peaceable* assembly,' (the language of the First Amendment itself). It also follows from the fact that the acts *charged in the indictments* before the Court, regardless of whether these indictments ultimately result in conviction or acquittal, describe 'hard core' conduct that would obviously be prohibited under a limiting construction of the riot statute, should one hereafter be made by the Georgia courts. Here, although we explicitly refrain from appraising the substantiality of the evidence for a conviction of any person charged, it is apparent that the actual *indictments* against the named plaintiffs and the others said to arise out of the occurrences on September 6th and 10th, come within the first part of the Riot Statute: 'any two or more persons who shall do an unlaw-

ful act of violence.' There is little doubt that under the long history of riot as a common law crime, the conduct charged would come within a possible permissible constitutional construction of the statute by the state court. We therefore, abstain from any determination as to the constitutionality of this section of the Georgia Criminal Code."

The Court in *Carmichael* then went on to discuss the application of *Dombroski* to show that the Riot Statute was being used to discourage civil rights activities and thereby infringing upon constitutional rights. The *Carmichael* court then said at Page 997:

"Plaintiffs assume an extremely heavy burden if they hope to prevail on this issue. The theory upon which they proceeded was that Defendant Carmichael and the SNCC Organization were immediately cast in the light of the villains in the violence that erupted on September 6th, and that the Defendants, under pressure by both local and national demands, set out to 'get' Carmichael and other SNCC leaders without regard to whether a case could properly be made against them or not.

We conclude that the Plaintiffs have simply failed to carry this burden."

Thus we see that the various cases cited by the Court in support of the retention of jurisdiction actually prescribed a fact situation of continuing harassment and threats of spurious enforcement which in no way exists in the instant case. Absent such a course of conduct, Plaintiffs perforce must rely upon the existence of pending charges in the Justice Court of Bell County. Since such charges do not exist and did not exist at the time of the hearing, this Court should have properly allowed the Motion to Dismiss by reason of mootness.

III.

Defendants urge that the opinion of the Court is contrary to the law and the facts in holding all of Article 474 of the Texas Penal Code to be unconstitutional.

Although the Stipulation of Facts submitted to the Court contains a statement to the effect that the Plaintiffs were charged under Article 474 of the Penal Code of Texas, Plaintiffs chose to submit the complaints themselves for the consideration of the Court. Nowhere on these complaints does there appear any notation to the effect that these charges are brought under Article 474 of the Texas Penal Code. Furthermore, there is no language contained in these complaints which in any way sets forth any of the actions or activities prohibited by Article 474. The stipulation cannot change that which appears upon the complaints themselves.

Certainly the Court erred in stating at Page 7 of the opinion:

> "Our inquiry deals with the overbreath attack as it relates to the part of the statute which prohibits the use of 'loud and vociferous . . . language . . . in a manner calculated to disturb the person or persons present.' "

Nowhere can the Court demonstrate that any charge was made that the Plaintiffs or any of them used loud and vociferous language in any manner. By the same token there is no showing that any of the Plaintiffs were charged with obscene, vulgar or indecent language or swearing or cursing. Nor were any of the Plaintiffs charged with exposing his or her person to another person of the age of sixteen (16) years or over. Nor were any of the Plaintiffs charged with rudely displaying any pistol or deadly weapon. Nor were any

of the Plaintiffs charged with yelling and shrieking. Likewise, none of the Plaintiffs have manifested any desire to do any of the enumerated things prohibited by Article 474 nor have they claimed to have a constitutional right to expose themselves to persons over the age of sixteen (16) years or to rudely display a pistol or deadly weapon or any of the other prohibited things.

Defendants therefore urge that the Court has given not a declaratory judgment but an advisory opinion, not based on any controversy or case properly before this Court.

IV.

Defendants urge that the opinion of the Court is contrary to the law and the facts wherein the Court has held that the provision regarding the use of loud and vociferous language would on its face prohibit speech which would stir the public to anger, would invite dispute, would bring about a condition of unrest, or would create a disturbance. Article 474 only prohibits such language when used at specified times and places. The Court goes on to point out that "Article 474 prohibits the use of 'loud and vociferous language . . . *in a manner calculated to disturb*' the public." This is erroneous in that Article 474 only prohibits a person from acting in this manner when he goes to a certain place and uses such loud and vociferous language to disturb the persons gathered there. This is vastly different from a statute which simply makes a shotgun prohibition against language which might stir up the public.

This is the distinguishing feature from the *Thomas v. the City of Danville case,* 207 Vir. 656, 152 S.E.2d 265 cited with favor by the Court. The injunction con-

tained in the *Thomas* case did not limit the conduct to specific times and places but was a blanket injunction and therefore not susceptible of ascertainment.

V.

Defendants urge that the Court erred in its opinion by failing to observe as a cannon of construction the Preamble to the Constitution of the United States which says, *inter alia:*

> "We the People of the United States, in Order to . . . insure domestic Tranquility, . . . do ordain and establish this Constitution for the United States of America."

Defendants urge strongly that any construction of the Texas Disturbing the Peace Statutes must be undertaken with full recognition of the foregoing constitutional provision.

WHEREFORE, premises considered, Defendants move the Court to grant a new trial for each and every of the reasons heretofore stated.

Respectfully submitted,

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(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO WIVISION

(Title omitted in printing)

RESPONSE TO MOTION FOR NEW TRIAL

To THE HONORABLE JUDGES OF SAID COURT:

To Defendants' Motion for New Trial Plaintiffs make the following response with respect to those portions of the Motion that appear to raise new matters.

1.

Contrary to Defendants' assertion and the authorities they cite to support it, the provisions of 28 U.S.C. §2284 are *not* jurisdictional, but procedural, *Van Buskirk v. Wilkinson,* 216 F. 2d 735, 737 (9 Cir., 1954); *Lion Manufacturing Co. v. Kennedy,* 330 F. 2d 833, 840 (D.C. Cir., 1964); see *Ex parte Poresky,* 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed 132 (1933); see also *National Council, etc. v. Caplin,* 224 F. Supp. 313, 314 (D.C., D.C., 1963).

The two earlier decisions relied upon by Defendants are inapposite. *Crescent Manufacturing Company* actually ruled another point and the material quoted therefrom at page 2 of Defendants' Motion is pure dicta. *Arneson v. Denny* decided only that an application for an interlocutory injunction would be dismissed because the court felt that the notice that was given was insufficient; however, this finding did not prevent the court from finally deciding the case in a separate opinion reported at 25 F. 2d 988.

It is significant, we think, that in each of these cases the claimed defect in procedural steps was called to the courts' attention prior to decision. Had the oversight

in the instant case been raised by Defendants before hearing, appropriate steps could have been taken by the Clerk of the Court to give the notice. Failure to raise the point constitutes, we submit, waiver.

Moreover, failure to give the notice has in no way harmed Defendants and the purpose of the provision has clearly been served. *Consolidated Freight Lines v. Pfost,* 7 F. Supp. 629, 630 (D.C. Idaho, 1934) points out that the purpose of the statutory provisions then in effect is "so that the state's interest may be protected . . ." Clearly the vigorous representation of the Defendants herein by the Attorney General was designed to protect that interest. The Attorney General of Texas is the lawyer not only for the State of Texas as a political entity but also for the Governor, Article IV, Section 22, Constitution of the State of Texas; Article 4399, V.A.C.S. Under these circumstances, it is difficult to see what additional purpose or function could be served by giving notice directly to the Governor.

If, however, the Court should determine that compliance with the notice provision is jurisdictional, contrary to the authorities and argument presented above, we suggest that it would be appropriate to withdraw the opinion heretofore rendered, direct the Clerk of the Court to give the notice and, if the Attorney General insists on it, hold another hearing and then reissue the opinion.

2.

Defendants' mootness point is largely a rehash of arguments already made and answered not only by Plaintiffs but also by the Court's opinion. Accordingly, the assertion is not further noticed here. It is suggested, however, that Defendants' remarks concerning this

Court's opinion and *Carmichael v. Allen* (Motion for New Trial, p. 5) come from a mis-reading of the latter.

3.

It is frivolous to assert, as Defendants do, that the Bell County prosecutions are not brought under Article 474, P.C. Not only was that very fact stipulated (Agreed Statement of Facts and Stipulations, page 3, paragraph 6) but it was on that very article that issue was joined by the pleadings (Defendants' Answer to Motion for Injunction, p. 2, paragraph III)[1]. That the complaints themselves do not expressly refer to Article 474 is of no moment. Complaints merely initiate the proceeding and there is no requirement that the statutory prohibition be specified. Surely the failure to specify Article 474 in the complaints cannot be construed to mean that the prosecution was being brought under some other article. We submit that the stipulations and pleadings are conclusive enough to foreclose further inquiry.

The balance of Defendants' argument in this section appears to be directed to the fact that Plaintiffs were not guilty of the charge of disturbing the peace. Under the authorities that matter is irrelevant. The fact is that they were being prosecuted and Sheriff Gunn's Affidavit reflects the information he had before authorizing Deputy Strange to file a disturbance complaint. He understood that Plaintiffs "had gotten into a squabble with some soldiers and Military Police . . . and that one of them had either *yelled* or had a sign saying something to the effect that 'Hitler's better than this,' or 'I like Hitler better'."

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[1] "Defendants deny as a matter of law that Article 474, Vernon's Texas Penal Code, is in any way unconstitutional under the Constitution of the United States.

4.

Defendants' attempt to distinguish Article 474 from the injunction in *Thomas v. City of Danville* is untenable. Just as the acts enjoined in *Thomas* had to occur in a public place so Article 474 prohibits similar acts and conduct "into or near any public place." Under the circumstances of this case, a bar against one going "into or near any public place" and using "loud and vociferous . . . language . . . in a manner calculated to disturb the person or persons present at such place . . ." is hardly distinguishable from "a shotgun prohibition against language which might stir up the public."

5.

In the interest of brevity, a philosophical discussion regarding the quoted Preamble to the Constitution of the United States is pretermitted. Suffice it to say that the many authorities relied upon by this Court in its opinion demonstrate that protection of exercise of freedom of expression under the First Amendment is a cornerstone in the preservation of this Nation and the Constitution including "domestic tranquility" the latter seeks to achieve.

WHEREFORE, premises considered, Plaintiffs pray that the Motion for New Trial be in all things overruled.

Respectfully submitted,

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. 67-63-W

UNIVERSITY COMMITTE TO END THE WAR IN VIET NAM, JAMES M. DAMON, JOHN E. MORBY and ZIGMUNT W. SMIGAJ, JR.,

vs.

LESTER GUNN, Sheriff of Bell County, Texas; A. M. TURLAND, Justice of the Peace, Bell County, Texas, Precinct No. 4; JOHN T. COX, County Attorney, Bell County, Texas

FOR PLAINTIFFS: SAM HOUSTON CLINTON, JR., Austin, Texas.

FOR DEFENDANTS: HOWARD FENDER, Assistant Attorney General of Texas, Austin, Texas.

BEFORE: HOMER THORNBERRY, Circuit Judge, ADRIAN A. SPEARS, Chief Judge and JACK ROBERTS, District Judge

ADDENDUM ON MOTION FOR NEW TRIAL

Subsequent to this Court's Opinion of April 10, 1968, the Defendants have filed a motion for new trial and brief in support thereof. Hence, the Court files this addendum to the original opinion to dispose of points raised in Defendants' motion.

I.

The contention is urged that the Bell County prosecutions were not brought under Article 474, Texas Penal Code, and thus that the Court inappropriately determined the constitutionality of that statute. This argument is without merit.

It is clear that the initial complaints which were brought against the individual plaintiffs did not specify Article 474; the only language informing plaintiffs of the nature of the charge against them was the typewritten phrase "Dist. the peace." However, that the complaints themselves do not expressly refer to Article 474 is of no moment. In the Agreed Statement of Facts and Stipulations, filed with the official papers in this cause, Plaintiffs and Defendants agreed that individual plaintiffs "were each charged with disturbing the peace in violation of Article 474." It was on the question of the constitutionality of Article 474 that issue was joined in the cause. An examination of the various Texas statutes which proscribe offenses against the public peace discloses that the only one encaptioned "disturbing the peace" is Article 474. And it is instructive to note that the complaints were ultimately dismissed on jurisdictional grounds, not for failure to adequately apprise these plaintiffs of the offense charged, i.e. Article 474. In short, there simply can be no doubt that these plaintiffs were charged with violating Article 474 of the Texas Penal Code.

The applicability of Article 474 is important because these arrests indicate that the State considers Article 474 an appropriate vehicle for the regulation or prohibition of demonstrations. Our original decision was that as presently written, Article 474 was not an appropriate vehicle for controlling demonstrations. The decision in no way implied that Texas lacks the power to regulate demonstrations, but implements the well-settled principle that "the power to regulate must be so exercised as not, in attaining a permissible end, to unduly infringe a protected freedom." *Shelton v. Tucker,* 364 U.S. 479 (1960). Our opinion indicated that this principle was disregarded in the Texas stat-

ute because its broad scope violated the dictates of the First Amendment. *Zwickler v. Koota,* 389 U.S. 241, 246 (1967).

II.

In Defendants' Motion for New Trial and the accompanying briefs, they strive to indicate that Texas courts have adopted a construction which substantially narrows Article 474's language. Defendants argument on this point is based on the view that the critical and dispositive phrase in Article 474 is the use of "loud and vociferous language." That view compels them to the conclusion that the statute invokes a prohibition only as to the quantum of noise or sound. The Defendants phrased their conclusion thusly:

> This interpretation by the Court of Criminal Appeals eliminates entirely under this Section of the Statute any offense based on the context of the words used and does not attempt to restrict the thoughts to be conveyed in violation of the First Amendment.

To support that conclusion, the Defendants direct our attention to three Texas cases in which the Texas Court of Criminal Appeal has defined the phrase "loud and vociferous language." In *Anderson v. State,* 20 S.W. 358 (Tex. 1892), the appellate court adopted Webster's definition of "vociferous" as "making a loud outcry; clamorous; noise; . . . with great noise in calling; shouting." See also *West v. State,* 97 S.W.2d 476 (Tex. 1936). In *Thomason v. State,* 265 S.W. 579 (Tex. 1924), the Court of Criminal Appeals defined "loud" as "marked by intensity, or relative intensity; not low, soft, or subdued." See also *West v. State, supra.* In all three cases, the convictions were reversed because the language used did not rise to the level of "loud and vociferous."

In holding that these definitions do not save the statute, we have considered the nature of the demonstrations that pervade our society today. The nature of these protest movements has convined us that while the Texas definitions may suffice for non-first amendment situations, they are inappropriate in the free-speech arena. The modern demonstration involves hundreds or thousands of citizens marching along highways, picketing public accommodations or schools, or conducting mass meetings in parks or other public buildings. Although these protests create problems, the decisions clearly hold that the peaceful expression of views by demonstrations, marches, and assemblies are within the ambit of the First Amendment. See *Strother v. Thompson,* 372 F.2d 654 (5th Cir. 1967); *Guyot v. Pierce,* 372 F.2d 658 (5th Cir. 1967); *Hamer v. Musselwhite,* 376 F.2d 479 (5th Cir. 1967); *N.A.A.C.P. v. Thompson,* 357 F.2d 831 (5th Cir. 1966); *Wooten v. Ohlen,* 303 F.2d 759 (5th Cir. 1962). Indeed, it has been held that the individual must be afforded some appropriate "public forum" for his peaceful protests. See *Guyot v. Pierce,* supra at 661; Kalvan, The Concept of the Public Forum: *Cox v. Louisiana,* 1965 Sup. Ct. Rev. 1.

Two Supreme Court cases confirm that Texas's definition of "loud and vociferous" aborts the right to express views by assemblies or demonstrations. In *Edwards v. South Carolina,* 372 U.S. 229 (1963), the protesters were arrested for "boisterous, loud, and flamboyant conduct" that created a breach of the peace. This conduct consisted of "loudly singing the Star-Spangled Banner and stamping their feet and clapping their hands." The Court held that the arrests violated their right to free speech and assembly. In *Cox v. Louisiana,* 379 U.S. 536 (1965), a large group

marched to the courthouse where they listened to speeches, sang and prayed. The officials testified that the crowd got unruly after Cox in an "inflammatory manner" urged everyone to go downtown and sit in at the lunch counters. The "loud cheering and clapping of the students" was another reason for their arrests. This conduct was described as "a jumbled roar like people cheering at a football game;" "loud cheering and spontaneous clapping and screaming and a great hullabaloo;" "a shout, a roar, and an emotional response in jubilation and exhortation." 379 U.S. at 546. In holding that such conduct did not constitute a breach of the peace, the Court noted that the testimony indicated that while the demonstration was loud, it was not disorderly. Because we are certain that the conduct in *Cox* and *Edwards* would be "loud and vociferous" within the Texas definitions, we hold that Texas has an overbroad definition of the offense when applied to activities fairly within first-amendment protection. Moreover, its scope could be used not only against demonstrations, but to curtail the street-corner orator that the authorities thought was too loud. The right to communicate ideas through speech and protests must carry with it the opportunity to win the attention of the public. The state may regulate that right only when substantial state interest necessitates protection. This statute, however, would allow suppression without requiring that any substantial disturbance was imminent; or that the noise of the demonstration stifled the operations of the building picketed; or drowned out other speakers, *Turner v. Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1966); or created a traffic or pedestrian movement problem.[1]

[1]This statute does not therefore carve out of a demonstration that conduct which does not have First Amendment protection. For examples of conduct that does not have this

Therefore, the quantum of disruption necessary for the violation of Article 474 constitutes an "unwarranted abridgement of the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." See *Guyot v. Pierce, supra* at 66. Indeed, any demonstration considered by this court could be suppressed for its "loud and vociferous" manner under the Texas statute.[8] It is these considerations, as well as the factors enumerated in our prior opinion that convince us that the breadth of Article 474 goes far beyond what is necessary to achieve a legitimate governmental purpose.

That does not, however, conclude our criticism, in terms of overbreadth, of the Texas statute; the definition of "loud and vociferous" does not end the interpretative problems created by Article 474. Not only do the Texas decisions convince us that Texas courts take seriously the requirement that the language be loud and vociferous, but they also, contrary to the Defend-

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protection, see *N.A.A.C.P. v. Thompson,* 357 F.2d 831 (5th Cir. 1966) (cannot obstruct traffic or block sidewalks); *Baines v. City of Danville,* 337 F.2d 579 (4th Cir. 1964) (could protest fact of segregated theaters but could not exclude others from use or have massive occupancy of the approaches); *Pritchard v. Downie,* 326 F. 2d 323 (8th Cir. 1964) (cannot have riotous conduct); *United States v. Aarons,* 310 F. 2d 341 (2d Cir. 1962) (cannot block launching of vessel); *Hurwitt v. City of Oakland,* 247 F. Supp. 995 (N.D. Cal. 1965) (a group of demonstrators could not insist upon the right to cardon off a street or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations).

[8] *Strother v. Thompson, supra; Guyot v. Pierce, supra; Hamer v. Musselwhite, supra; N.A.A.C.P. v. Thompson, supra; Pritchard v. Downie, supra; Baines v. City of Danville, supra; Cottonreader v. Johnson,* 252 F. Supp. 492 (M.D. Ala. 1966); *Hurwitt v. City of Oakland, supra; Williams v. Wallace,* 240 F. Supp. 100 (M.D. Ala. 1965); *United States v. Clark,* 249 F. Supp. 720 (S.D. Ala. 1965); *King v. City of Clarksdale,* 186 So. 2d 228 (Sup. Ct. Miss. 1966).

ants' suggestion, indicate that Texas courts take seriously that part of Article 474 that prohibits the use of loud and vociferous language "in a manner calculated to disturb the person or persons present." In other words, to sustain a conviction, not only must the first element be present but there is the further requirement that the action be done in a manner calculated to disturb. A simple reading of the statute and a review of the cases make this second requirement apparent.

Article 474 prohibits "swearing and cursing . . . . in a manner calculated to disturb. . . ." Is simply swearing and cursing sufficient for a conviction? Not according to *Young v. State,* 44 S.W. 507, 508 (Tex. 1898), where the Court of Criminal Appeals approved the following language:

> That the mere cursing or swearing or other language uttered is not the gist of the offense, but such cursing or swearing or use of other language must be in a manner reasonably calculated to disturb the people or a part of the people assembled at the public place. . . .

Article 474 prohibits "rudely displaying a pistol . . . in a manner calculated to disturb. . . ." In *Bell v. State,* 256 S.W. 2d 108, 109 (Tex. 1953), the court stated:

> There is no offense known as "rudely displaying a pistol," but such may constitute a violation of the disturbing-the-peace statute, art. 474, Vernon's Ann.P.C., *when done in a manner calculated to disturb the peace.* (Emphasis added.)

And in *West v. State,* supra, at 473, a loud-and-vociferous language case cited by the Defendants, the Court of Criminal Appeals in its original opinion made it clear that more must be submitted to the jury than simply the question of loud and vociferous language:

> Whether or not appellant's conduct and the language used by him was such as was calculated to disturb the inhabitants at the time and place charged was a question for the jury to determine.

Indeed, the State's own argument concedes that the phrase "calculated to disturb the person or persons present . . ." has not been read out of the statute. The state has said that loud and vociferous language refers "to a course of conduct which creates so great an amount of noise that it was calculated to disturb the peace and tranquility of the occupants of a private residence or person in a public place." This contention undermines the State's original suggestion and reveals that the key to understanding the Texas statute is not the meaning of loud and vociferous, but the effect, in terms of quantum of disturbance, that the speech had on others. An examination of the Texas decisions shows that this quantum of disturbance is the same as that condemned in *Ewards* and *Cox*. E.g., *Woods v. State,* 213 S.W.2d 685, 687 (Tex. 1948), and *Head v. State,* 96 S.W.2d 981, 982-83 (Tex. 1936). These decisions prompted our original holding that the peaceful, orderly expression of views by marches or demonstrations cannot be interfered with, merely because the views expressed may be so unpopular at the time as to stir the public to anger, invite dispute, or create the chance of unrest. See *Hurwitt v. City of Oakland,* 247 F. Supp. 995 (N.D. Cal. 1965). See also *Brown v. Louisiana,* 383 U.S. 131, 147 (1966); *Cox v. Louisiana, supra* at 552. Thus the quantum of disturbance necessary for violation sweeps within its broad scope conduct protected by the First Amendment.

We emphasize again that our holding does not mean that Texas lacks the power to regulate demonstrations. These regulations on the time, place, and manner must

be reasonable and implemented by a narrowly drawn statute.' Article 474 is not a reasonable regulation for deciding when the protest movements impinge on the peace and order of the community because it unduly circumscribes protected conduct under the guise of preserving public order.

For these reasons, the defendants' motion for new trial is OVERRULED and it is so ORDERED.

HOMER THORNBERRY
United States Circuit Judge
ADRIAN A. SPEARS, Chief Judge
United States District Court
JACK ROBERTS
United States District Judge

FILED: May 31, 1968

'See *N.A.A.C.P. v. Thompson, supra; Baines v. City of Danville, supra; Pritchard v. Downie, supra; Turner v. Goolsby, supra; Cottonreader v. Johnson, supra; United States v. Clark, supra.*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. 67-63-W

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, ET AL.

vs.

LESTER GUNN,
SHERIFF OF BELL COUNTY, ET AL.

ORDER DENYING MOTION

On this the 25th day of April, 1968, came on to be considered by this Court, the motion for new trial, filed by the Defendant in the above styled and numbered cause, and it appearing to the court after consideration of the motion and brief, and response thereto, and it being the opinion of the Court that same is without merit, it is hereby,

Ordered, adjudged and decreed that the motion of the Defendant for new trial be and the same is hereby denied.

It is the further order of the Court that the clerk furnish a copy of this order to all attorneys of record.

Signed at Austin, Texas.

HOMER THORNBERRY
United States Circuit Judge

ADRIAN A. SPEARS
Chief Judge, United States District Court

JACK ROBERTS
United States District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

---------- TERM, [redacted] 1969

No. --[redacted] 7

LESTER GUNN, ET AL.,
Appellants

vs.

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, ET AL.,
Appellees

On Direct Appeal From the United States District Court
Western District of Texas
Waco Division

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

---------- TERM, 19----

No. ------

LESTER GUNN, ET AL.,

Appellants

vs.

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, ET AL.,

Appellees

On Direct Appeal From the United States District Court
Western District of Texas
Waco Division

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Western District of Texas, declaring a statute of the State of Texas to be unconstitutional and threatening to enjoin its enforcement. This statement is submitted pursuant to Rule 15 of the Rules of the Supreme Court to demonstrate that this Court has jurisdiction to consider the appeal and that substantial federal questions are involved herein.

REFERENCE TO OPINIONS BELOW

The District Court rendered its opinion in the case below after completion of the evidence, arguments, and submission of briefs. It also rendered two opinions in connection with the motion for new trial by the State of Texas. These opinions are reported in —— F.Sup. —— (1968). A copy of said opinions and a copy of the orders issued in connection therewith are attached hereto and set forth in the appendix.

GROUNDS OF JURISDICTION

This action was instituted by Plaintiffs pursuant to Title 28 U.S.C. §§1331(A), 1343 (3) (4), 2201, 2202, 2281, and 2284; 42 U.S.C. 1981, 1983, and 1985. A court comprised of three judges was instituted to hear this cause in the court below as provided by 28 U.S.C. § 2284. On April 9, 1968, the court entered its injunction declaring Article 474, Vernon's Texas Penal Code, to be unconstitutional on its face and threatening to enjoin the enforcement thereof. On April 25, 1968, an order was entered denying motion for new trial and on May 31, 1968, an additional "Addendum on Motion for New Trial" was entered by the court. A notice of appeal to this court was filed in the United States District Court for the Western District of Texas on the 6th day of May, 1968.

This is a direct appeal from the judgment of a three judge district court granting, after hearing, the right to an injunction against enforcement of a State statute, a case required by Title 28, U.S.C. 2281 and 2284, to be heard by a three judge court. This court has jurisdiction to consider this appeal under Title 28, U.S.C., Section 1253. *Florida Lime and Avocado Growers, Inc.,*

et al., v. Jacobsen, 362 U.S. 73 (1960); *Radio Corporation of America v. United States* (D.C. Illinois, 1950), 95 F.Sup. 660, affirmed 341 U.S. 412, 71 S.Ct. 806, 95 L.Ed. 1062; *Stafford v. Wallace* (1922), 258 U.S. 494, 42 S.Ct. 397, 66 L.Ed. 735.

The text of Article 474 of Vernon's Texas Penal Code reads as follows:

> "Whoever shall go into or near any public place, or into or near any private house, and shall use loud and vociferous or obscene, vulgar or indecent language or swear or curse, or yell or shriek or expose his or her person to another person of the age of sixteen (16) years or over, or rudely display any pistol or deadly weapon, in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200). As amended Acts 1950, 51st Leg., 1st C.S., p. 50, ch. 10, §1."

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Did the Trial Court err in failing to grant Defendant's motion to dismiss?

2. Did the Trial Court err in declaring Article 474, Vernon's Texas Penal Code unconstitutional on its face?

3. Did the Trial Court err by failing to accept and apply Texas decisions construing and limiting Article 474, Texas Penal Code, in reaching its conclusions of over breadth?

4. Did the Trial Court err in failing to grant defendant's motion for new trial for failure to perfect jurisdiction in that five days written notice of the hearing was not served on the Governor of Texas as required by 21 U.S.C., Section 2284(2)?

STATEMENT OF THE CASE

In late 1967, the President of the United States was scheduled to make inspection of Fort Hood, a United States Army installation located near Killeen, Texas. Plaintiffs in the court below, after learning that the President intended to make a dedicatory speech at Central Texas College, a newly established institution, located on a portion of land comprising the Fort Hood Reservation, sought to demonstrate against the war in Viet Nam. A crowd of 25,000, approximately, gathered to hear the President's address and was composed of civilians and servicemen in uniform. Many of the servicemen were returned Viet Nam war veterans. An air of hostility developed promptly, but the protesters decided to push on. (The court below specifically declined to rule on whether or not they should have realized that their continued approach might cause a disturbance or even violence.)

Several uniformed soldiers attacked the group of protesters and tore up their signs. The military police arrested the three named plaintiffs and subsequently turned them over, after the arrest, to the sheriff of Coryell County. The three men were transported to Copperas Cove in Coryell County where it was subsequently discovered that the disturbance had occurred in Bell County. Sheriff Lester Gunn of Bell County authorized his deputy to file "disturbing the peace"

charges against the three. It is not known what disposition, if any, the military took concerning military personnel engaged in the scuffle. The plaintiffs made bond within approximately an hour. On December 19, 1967, this case was filed and a temporary restraining order was granted prohibiting the prosecution of the charges against the three men. After investigation, on February 13, 1968, local authorities in Bell County decided that the offense had occurred on a Federal enclave on which jurisdiction of criminal matters had been ceded to the Federal Government and dismissed the three cases.

On February 14, 1968, the defendants requested dismissal on the grounds that all questions were moot. The hearing was scheduled on February 23, 1968, and the court carried the motion to dismiss with the merits of the case. Notice of the hearing was not given to the Governor of Texas as required by Title 28, U.S.C., Section 2284 (2).

After the hearing, the court ruled that Article 474 was unconstitutional on its face, as it was impermissibly and unconstitutionally broad.

QUESTIONS ARE SUBSTANTIAL

The questions presented are so substantial as to require plenary consideration because the decision of the trial court is at variance with the published opinions of this court.

A three judge Federal Court has declared that Article 474, Vernon's Texas Penal Code is unconstitutional on its face because it is impermissibly broad. In addition, the decision in question does not limit the

effect of the declaration of unconstitutionality to any one phrase or section of the statute. The opinions of the court below discuss the use of "loud and vociferous . . . language . . . calculated to disturb the person or persons present. . . ." The court did not give a reason why the remaining language of the statute was overly broad or too vague to apprise a person of the nature of the charge against him and we do not think they intended to so hold.

In holding the statute void for over breadth, the District Court has ignored the narrow interpretation placed thereon by the Court of Criminal Appeals of Texas, the highest Court on criminal matters in the State. Texas courts for a period of seventy-five years have held that the use of "loud and vociferous language calculated to disturb" related to the manner of delivery of speech rather than the contents. It was the degree of loudness that the statute, according to the highest Texas Court in criminal matters, sought to regulate. See *Anderson v. State,* 20 S.W. 358 (1892); *Thompson v. State,* 265 S.W 579 (1942); *West v. State,* 97 S.W. 2d 476 (1936).

The interpretation of the Court of Criminal Appeals of Texas limiting a conviction for the use of "loud and vociferous language" to proof of turbulent or brawling speech or language which creates so great an amount of noise that it was calculated to disturb the peace and tranquility of the occupants of a private residence or persons in a public place should have been given effect by the court below just as if written into the statute. *Cox v. State of New Hampshire,* 312 U.S. 569. *Poulos v. State of New Hampshire,* 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105, *Shuttlesworth v. City of*

Birmingham, 382 U.S. 87; 86 S.Ct. 211 (1965), *Cox v. Louisiana,* 379 U.S. 538, 85 S.Ct. 453, 459 (1965).

In view of the limitation placed on the statute by the Texas Court of Criminal Appeals, we do not believe that the reasons given in *Terminiello v. City of Chicago,* 337 U.S. 1 (1949), and the other cases cited by the court in its opinions are applicable because in each instance cited in these cases, there was an attempt to regulate the content of the speech rather than the manner in which it was given.

At the time of refusal to grant defendant's motion for dismissal, there were no charges against the plaintiffs nor were any officials of the State of Texas threatening to file charges. The initial arrests were made by the military police from Fort Hood, Texas, and plaintiffs were turned over by military police while still under arrest to county officials as they were civilians. The area where plaintiffs were arrested had been acquired by the United States Government as a part of Fort Hood Military Reservation and the local officials, at the time of dismissal of the charges, reached the conclusion that this area was still under the sole jurisdiction of the United States Government. We do not think that *Dombrowski, et al. v. Pfister,* 85 S.Ct. Rep. 1116, 380 U.S. 479 applies in a case of this kind. As there is no evidence that State officials are threatening to act in any way to "chill" the constitutional rights of plaintiffs in the future, the court below, after dismissal of the state charges, was merely giving an advisory opinion and the case should have been dismissed. *Amalgamated Association of Street Electrical Railway and Motorcoach Employees of America, Division 998 v. Wisconsin Employment Relation Board,*

71 S.Ct. 373, 340 U.S. 416, 95 L.Ed. 416; *McGrath v. Kristensen,* 71 S.Ct. 224, 340 U.S. 162, 95 L.Ed. 173; *Keller v. Potomac Electric Power Company,* 43 S.Ct. 445, 261 U.S. 428; 67 L.Ed. 731.

Several recent cases hold that where there is no evidence that local officials employed arrests and threats of prosecution under a State statute such as Article 474 in a way that would discourage the plaintiffs and their supporters from asserting and attempting to assert their constitutional rights, an injunction should not issue and the cause should be dismissed. See *Brooks v. Riley,* 374 F.Sup. 538 (1967) affirmed — U.S. — (1968), *Zwicker v. Boll,* 270 F.Sup. 131 (1967) affirmed — U.S. — (1968), *Cameron v. Johnson,* — U.S. —, 3 Cr. L. 3043.

An examination of the order issued by the Trial court leaves some doubt as to the issuance of an injunction. In the early part of the order, the court states that injunctive relief is no longer in the case. But in the summation, the court says Plaintiffs (Appellees) are *entitled* to injunctive relief. If this is interpreted as granting or denying an interlocutory injunction, Appellees urge that such is an abuse of discretion for all the reasons urged heretofore that such actions constituted error.

We submit that Article 474, Vernon's Texas Penal Statute is not overly broad and is not unconstitutional on its face. The action of the court below in enjoining the enforcement of Article 474 does, however, "chill"

the right of the State of Texas to preserve law and order within its own boundaries.

Respectfully submitted,

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By----------

CERTIFICATE OF SERVICE

I, Howard M. Fender, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Jurisdictional Statement has been served on counsel for the Appellees by depositing same in the United States Mail, postage prepaid, addressed to Mr. Sam Houston Clinton, Jr., 308 West 11th, Austin, Texas 78701, this the 3rd day of July, 1968.

HOWARD M. FENDER
Assistant Attorney General

IN THE

SUPREME COURT OF THE UNITED STATES

---------- TERM, [redacted] 1969

No. [redacted] 7

LESTER GUNN, ET AL.,

Appellants

vs.

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, ET AL.,

Appellees

On Direct Appeal From the United States District Court
Western District of Texas
Waco Division

APPENDIX TO JURISDICTIONAL STATEMENT

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CONTENTS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. 67-63-W

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, JAMES M. DAMON, JOHN E. MORBY and ZIGMUNT W. SMIGAJ, JR.

vs.

LESTER GUNN, Sheriff of Bell County, Texas; A. M. TURLAND, Justice of the Peace, Bell County, Texas, Precinct No. 4; JOHN T. COX, County Attorney, Bell County, Texas

FOR PLAINTIFFS: SAM HOUSTON CLINTON, JR., Austin, Texas.

FOR DEFENDANTS: HOWARD FENDER, Assistant Attorney General of Texas, Austin, Texas.

BEFORE: HOMER THORNBERRY, Circuit Judge, ADRIAN A. SPEARS, Chief Judge and JACK ROBERTS, District Judge.

PER CURIAM: The University Committee to End the War in Viet Nam is an un-incorporated voluntary association composed of young men and women who are residents of Austin, Texas, and its environs. The purpose of the University Committee is to protest the conduct of the war in Viet Nam by means of discussions, publications, demonstrations, and non-violent direct action, in an attempt to bring the war in Viet Nam to a quick non-military end. The individual plaintiffs include both members of the University Commit-

tee and persons sympathetic to its purposes who participate in its affairs. The defendants are duly elected officials of Bell County, Texas.

During Monday, December 11, 1967, and the morning of Tuesday, December 12, 1967, various news media in the Central Texas area reported that The President of the United States was to appear and speak at a dedicatory program at Central Texas College. Central Texas College is situated near Killeen, Bell County, Texas. Killeen is a city of some 30,000 population and serves nearby Fort Hood, a large United States military establishment, reported to be the largest United States armored post. Fort Hood has a population of about 35,000 soldiers and an equal number of civilian dependents. From Fort Hood military members of armed units of the United States Army are transferred to Viet Nam and from Viet Nam many veterans of military service there are transferred to Fort Hood. The President of the United States was also scheduled to make an inspection of Fort Hood on December 12, 1967. Accompanying the President and his official party on the occasion of his appearance at Central Texas College was the usual corps of so-called White House press correspondents, and other representatives of the news media including television commentators and cameramen. Some 25,000 military personnel, their dependents, and civilians from in and around the central Texas area were assembled to hear the President of the United States and other speakers on the dedicatory program.

The evidence indicates that the members of the University Committee learned of the President's scheduled appearance on the morning of December 12, about

three hours before the program was to begin. As many Committee members and interested parties as possible were notified, and several carloads of persons desiring to attend the President's speech drove to Killeen. The President had begun speaking when the group, which included the individual plaintiffs, arrived at the turn-off to the college. They parked the car some distance from the speaking area at the college. After choosing placards and signs, the group began walking in the direction of the college. The first people that the group met were friendly, waving and taking pictures of the group with their signs. They then came upon the main speaking grounds which were filled with soldiers in uniform and civilians.[1]

The group soon was surrounded by soldiers, some friendly, some hostile. Several of the group were attacked by soldiers, who snatched away the placards

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[1]The signs used by the group were neither abusive nor obscene. Thereon were printed such slogans as "I Have but One Idol—Hitler. 'General Ky';" "The War in Vietnam May be the Initial Phase of World War III. 'U Thant';" and "Wrong War, Wrong Time, Wrong Place. 'General Shoup'." However, members of the group knew that many of the servicemen were Viet Nam veterans; that the tremendous crowd at Fort Hood had peaceably assembled to hear their Commander-in-Chief; and that any untoward incident would likely cause the police, military and civilian, to react quickly to safeguard the President of the United States. As the group moved nearer to where the President was speaking, the epithets became angrier, and the general atmosphere of hostility was more pronounced. One member of the group stated that he had been dismayed at the sight of so many soldiers, but decided to proceed anyway. All of this, of course, lends credence to the argument that plaintiffs should have foreseen that a continuation of their protest, under the circumstances, would, in reasonable probability, provoke a disturbance, and possibly even end up in violence. See Feiner v. New York, 340 U.S. 315. But in our disposition of this case we do not reach and, therefore, do not decide this issue.

and physically struck several persons in the group. At that point, several military police seized members of the group and carried them out of the crowd. They were taken to sheriff's deputies. After being handcuffed and frisked, three were taken to the Killeen, Bell County Jail. Apparently there was some disagreement as to whether the incident had occurred on property lying in Coryell County or on property within Bell County. When the decision was reached that the incident was within the jurisdiction of the Bell County authorities, complaints were filed against the three men, charging the offense of disturbing the peace. Although the maximum punishment under the Texas "Disturbing the Peace" statute, *Tex. Pen. Code Ann.*, Art. 474 (1952) is a fine of $200, the Bell County Justice of the Peace set bail for each of the men at $500.

This suit, seeking interlocutory and permanent injunctions and a declaratory judgment, was filed on December 21, 1967. Subsequently, on February 13, 1968, the criminal charges in Bell County were dismissed, on the County Attorney's motion; the reason recited for the dismissal was that the alleged offenses had occurred on a federal enclave, to which criminal jurisdiction had been ceded by the State of Texas.

I.

The dismissal of the criminal charges in Bell County caused the defendants in the present action to move this Court to dismiss this action for lack of jurisdiction. Defendants contend that the case is now moot for the reason that "no useful purpose could now be served by the granting of an injunction to prevent the prosecution of these suits because same no longer exists."

It appears, in other words, that defendants' motion to dismiss is addressed to that part of the plaintiffs' complaint which seeks an injunction against the prosecution of the criminal charges in Bell County. We are clear that that part of plaintiffs' prayer is no longer before us. But we cannot fail to understand that, just as in *Dombrowski v. Pfister,* 380 U.S. 479, 483-492 (1965) and *Zwickler v. Koota,* 389 U.S. 241, 253-254 (1967), more is involved where the prayer for relief also requests a declaratory judgment that the statute under which the criminal charges were brought is unconstitutional on its face for being overly broad. The dispositive question at this point then is whether the additional prayer defeats the defendants' argument that this Court is presently without jurisdiction to determine the merits of the case.

Any discussion of plaintiffs' standing in this regard must begin with a consideration of *Dombroski* (sic) *v. Pfister, supra.* In that case the appellants brought suit for injunctive and declaratory relief to restrain the prosecution or threatening of prosecution under Louisiana's Subversive Activities law, which they alleged violated their rights of free expression. A three-judge court dismissed the complaint, holding that there was involved a proper case for abstention pending possible future narrowing of the state statute by state courts. The Supreme Court reversed, holding the abstention doctrine (i.e. waiting for a state court to clarify the state statute) inapplicable. The following language bears on our determination:

> When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves

too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. . . . For '*(t)he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . .*' Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. . . . For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. . . . We have fashioned this exception to the usual rules governing standing . . . because of the '. . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. (Emphasis added.)

380 U.S. at 486-487. The Court then drew its conclusion, containing the now famous metaphor: "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." 380 U.S. at 487. Indeed the Court went even further: "So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." 380 U.S. at 494.

The same kind of notion had been voiced earlier by the Fifth Circuit in *Baldwin v. Morgan,* 251 F.2d 780 (5th Cir. 1958). There a group of Negroes had brought a class action for injunction and declaratory relief

against compulsory segregation in railroad waiting rooms. State charges had been filed against the Negroes but were dismissed because only the offending railroad or bus line could be criminally punished under the law. The Fifth Circuit held that the fact that criminal charges had been dismissed as against these particular plaintiffs did not bar the federal action:

> When the criminal proceeding was closed, it did not automatically take with it the charge made in this cause that state agencies, pretending to act for the state and exerting the power of their respective offices were, under the threat of arrest or other means, depriving Negroes of the right to be free of discrimination in railway public waiting rooms on account of race or color. (Emphasis added.)

251 F.2d at 787.

More recently, in *Carmichael v. Allen,* 267 F.Supp. 985 (N.D. Ga. 1967), a three-judge court had occasion to consider the mootness contention. Among other charges against the appellant was one charging him with violation of the Georgia statute on inciting insurrections. The state Solicitor General had disavowed any intention to prosecute under that statute for the acts already done. In the following language the three-judge court granted an injunction prohibiting future prosecutions under the insurrection law:

> Although the Solicitor General, defendant in this case, disavows any intention of presenting a proposed bill of indictment against any of these plaintiff or any others for acts arising out of (the past events), or otherwise to seek prosecution for such acts under these insurrection statutes, neither Mr. Slaton nor any other representative of the state of

> Georgia has disavowed any further intention to use these statutes in the future. It is hardly necessary to point out the 'chilling' effect upon the exercise of the freedom of speech and assembly of a statute prescribing punishment by electrocution if a person, conscientiously seeking to exercise these rights, must pattern his speech with the ever present threat of such a sanction.

267 F.Supp. 994.

Is there then the requisite "chilling effect" here? The sworn evidence in support of the plaintiffs' prayer for relief indicates that these men have ceased efforts to carry out the purposes and objectives of the University Committee for fear of sanctions under the statute which is presently attacked, that they have "postponed further expression of (their) views through peaceful, non-violent activities lest (they) be arrested" for disturbing the peace. This in itself demonstrates a broad curtailment of activities which may include, and (as discussed in Part II) do include, protected behavior. Not only, as in *Carmichael, supra* at 994, can the presence of this statute cause a person to "pattern his speech with the ever present threat" of sanctions; here, it appears to have induced suspension of expression altogether.

With this background, how then do we evaluate the defendants' argument that inasmuch as the state charges have been dismissed, the record is bare, there is no "case or controversy," there is nothing useful which can be accomplished. Of course, it ignores the reality that plaintiffs' prayer includes the request for a declaration that the statute is unconstitutional on its face. It ignores the notion, introduced in *Dombrowski* and reiterated in *Carmichael,* that the statute's simple

presence on the books (which is what the plaintiffs are attacking) may have the requisite "chilling effect" on constitutionally protected behavior to warrant close judicial scrutiny. It even ignores that at least twice in the area of First Amendment rights, the United States Supreme Court has felt compelled to decide the constitutionality of state statutes where no state criminal charges thereunder were pending.[3] We therefore overrule Defendant's Motion to Dismiss, and proceed to a consideration of the merits.

II.

Before we discuss the issues presented as to the merits of this controversy, it may be wise to state what is not involved. This case does not involve in any way an appraisal of the constitutionality of the application of the statute to the plaintiffs; we do not evaluate whether Article 474 was constitutionally applied to these plaintiffs' activities. Our sole concern is the determination of whether Article 474 on its face is, as plaintiffs argue, constitutionally defective as being overly broad.

Article 474 provides:

> Whoever shall go into or near any public place, or into or near any private house, and shall use loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or well (*sic*)* or shriek or expose his or her person to another person of the age of sixteen (16) years or over, or rudely display any pistol or deadly weapon, in a manner calculated to disturb the person or persons pres-

[3] *Dombrowski, supra*, and *Baggett v. Bullitt*, 377 U.S. 360 (1964), as to the 1931 state loyalty oath. In addition, there was the determination of unconstitutionality after the disavowal of prosecution found in *Carmichael*.

*Appears in statute as "yell."

> ent at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200).

Our inquiry deals with the overbreadth attack as it relates to the part of the statute which prohibits the use of "loud and vociferous . . . language . . . in a manner calculated to disturb the person or persons present." Does that part of the statute

> offend the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'

Zwickler v. Koota, 389 U.S. at 250.

The United States Supreme Court some years ago in *Cantwell v. Connecticut,* 310 U.S. 296 (1940), outlined in broad terms the legitimate thrust of the breach of the peace offense:

> When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.

310 U.S. at 308. The Court vacated Cantwell's conviction because there had been no showing of violent or truculent conduct or assault or threatening of bodily harm.

In *Terminiello v. City of Chicago,* 337 U.S. 1 (1949), the petitioner was convicted for violation of a disorderly conduct ordinance. The trial court had charged that "the misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute,

brings about a condition of unrest, or creates a disturbance. . . ." The Court struck down the conviction, saying

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.* (Emphasis added.)

337 U.S. at 4.

The Supreme Court, in *Edwards v. South Carolina,* 372 U.S. 229 (1963), had before it a state statute, which, like *Terminiello,* permitted conviction if the speech "stirred people to anger, invited public dispute, or brought about a condition of unrest." 372 U.S. at 238. The evidence was that the petitioner had engaged in conduct which was boisterous, loud, and flamboyant. 372 U.S. at 233. The Court struck down the conviction, utilizing the *Terminiello* reasoning. An Atlanta city ordinance, prohibiting disorderly conduct, came under similar condemnation in *Carmichael v. Allen, supra.* The ordinance prohibited acting "in a boisterous manner." The three-judge court declared the ordinance unconstitutional as an unwarranted restriction of First Amendment Rights.

Texas Article 474 suffers the same constitutional infirmity. It cannot be doubted that the provision regarding the use of loud and vociferous language would, on its face, prohibit speech which would stir the public to anger, would invite dispute, would bring about a condition of unrest, or would create a disturbance. In so doing, the statute on its face makes a crime out of what is protected First Amendment activity. This is impermissible.

The Texas statute is subject to attack for still another reason. As pointed out earlier, Article 474 prohibits the use of "loud and vociferous language . . . *in a manner calculated to disturb*" the public. (Emphasis added.) Similar provisions have been subject to judicial scrutiny in *Cantwell v. Connecticut,* 310 U.S. at 308; *Ashton v. Kentucky,* 384 U.S. 195, 200 (1966); *Carmichael v. Allen,* 267 F.Supp. at 998-999; and *Baker v. Bindner,* 274 F.Supp. 658, 662-663 (1967). Despite the defendants' contention that the language of Article 474 is significantly different from those examined in the above cases, it is our opinion that Article 474 must be added to the list of statutes which "leave to the executive and judicial branches too wide a discretion in the application of the law." It "leaves wide open the standard of responsibility," relying on "calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments per se." For this additional reason, Article 474 is vulnerable to constitutional attack.

The case which appears to present questions closest to our own is *Thomas v. City of Danville,* 207 Va. 656, 152 S.E. 2d 265 (1967). There the petitioners were appealing on constitutional grounds a restraining or-

der issued by the local corporation court. Among other things the order restrained the petitioners:

> (4) From creating *unnecessarily loud,* objectionable, offensive and insulting noises, *which are designed to upset the peace and tranquility of the community;* and
>
> (5) From engaging in any act in a violent and tumultous manner or holding unlawful assemblies *such as to unreasonably disturb or alarm the public.* (Emphasis added.)

Because of the modifying language in the order, the scope of the restraint there was narrower than under the Texas statute. However, the Supreme Court of Appeals of Virginia had no difficulty in striking down the above parts of the order, doing so on *Terminiello* grounds.

We reach the conclusion that Article 474 is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of Article 474 as now worded, insofar as it may affect rights guaranteed under the First Amendment. However, it is the Order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements.

Signed at Austin, Texas this ---- day of April, 1968.

HOMER THORNBERRY
United States Circuit Judge

ADRIAN A. SPEARS
Chief Judge, United States District Court

JACK ROBERTS
United States District Judge

ORDER DENYING MOTION
(For New Trial)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. 67-63-W

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, ET AL.

vs.

LESTER GUNN,
SHERIFF OF BELL COUNTY, ET AL.

ORDER DENYING MOTION

On this the 25th day of April, 1968, came on to be considered by this Court, the motion for new trial, filed by the Defendant in the above styled and numbered cause, and it appearing to the court after consideration of the motion and brief, and response thereto, and it being the opinion of the Court that same is without merit, it is hereby,

Ordered, adjudged and decreed that the motion of the Defendant for new trial be and the same is hereby denied.

It is the further order of the Court that the clerk furnish a copy of this order to all attorneys of record.

Signed at Austin, Texas.

HOMER THORNBERRY
United States Circuit Judge

ADRIAN A. SPEARS
Chief Judge, United States District Court

JACK ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. 67-63-W

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, JAMES M. DAMON, JOHN E. MORBY and ZIGMUNT W. SMIGAJ, JR.

vs.

LESTER GUNN, Sheriff of Bell County, Texas; A. M. TURLAND, Justice of the Peace, Bell County, Texas, Precinct No. 4; JOHN T. COX, County Attorney, Bell County, Texas

FOR PLAINTIFFS: SAM HOUSTON CLINTON, JR., Austin, Texas.

FOR DEFENDANTS: HOWARD FENDER, Assistant Attorney General of Texas, Austin, Texas.

BEFORE: HOMER THORNBERRY, Circuit Judge, ADRIAN A. SPEARS, Chief Judge and JACK ROBERTS, District Judge.

ADDENDUM ON MOTION FOR NEW TRIAL

Subsequent to this Court's Opinion of April 10, 1968, the Defendants have filed a motion for new trial and brief in support thereof. Hence, the Court files this addendum to the original opinion to dispose of points raised in Defendants' motion.

I.

The contention is urged that the Bell County prosecutions were not brought under Article 474, Texas

Penal Code, and thus that the Court inappropriately determined the constitutionality of that statute. This argument is without merit.

It is clear that the initial complaints which were brought against the individual plaintiffs did not specify Article 474; the only language informing plaintiffs of the nature of the charge against them was the typewritten phrase "Dist. the peace." However, that the complaints themselves do not expressly refer to Article 474 is of no moment. In the Agreed Statement of Facts and Stipulations, filed with the official papers in this cause, Plaintiffs and Defendants agreed that individual plaintiffs "were each charged with disturbing the peace in violation of Article 474." It was on the question of the constitutionality of Article 474 that issue was joined in the cause. An examination of the various Texas statutes which proscribe offenses against the public peace discloses that the only one encaptioned "disturbing the peace" is Article 474. And it is instructive to note that the complaints were ultimately dismissed on jurisdictional grounds, not for failure to adequately apprise these plaintiffs of the offense charged, i.e. Article 474. In short, there simply can be no doubt that these plaintiffs were charged with violating Article 474 of the Texas Penal Code.

The applicability of Article 474 is important because these arrests indicate that the State considers Article 474 an appropriate vehicle for the regulation or prohibition of demonstrations. Our original decision was that as presently written, Article 474 was not an appropriate vehicle for controlling demonstrations. The decision in no way implied that Texas lacks the power to regulate demonstrations, but implements the well-

settled principle that "the power to regulate must be so exercised as not, in attaining a permissible end, to unduly infringe a protected freedom." *Shelton v. Tucker,* 364 U.S. 479 (1960). Our opinion indicated that this principle was disregarded in the Texas statute because its broad scope violated the dictates of the First Amendment. *Zwickler v. Koota,* 389 U.S. 241, 246 (1967).

II.

In Defendants' Motion for New Trial and the accompanying briefs, they strive to indicate that Texas courts have adopted a construction which substantially narrows Article 474's language. Defendants argument on this point is based on the view that the critical and dispositive phrase in Article 474 is the use of "loud and vociferous language." That view compels them to the conclusion that the statute invokes a prohibition only as to the quantum of noise or sound. The Defendants phrased their conclusion thusly:

> This interpretation by the Court of Criminal Appeals eliminates entirely under this Section of the Statute any offense based on the context of the words used and does not attempt to restrict the thoughts to be conveyed in violation of the First Amendment.

To support that conclusion, the Defendants direct our attention to three Texas cases in which the Texas Court of Criminal Appeals has defined the phrase "loud and vociferous language." In *Anderson v. State,* 20 S.W. 358 (Tex. 1892), the appellate court adopted Webster's definition of "vociferous" as "making a loud outcry; clamorous; noise; . . . with great noise in calling; shouting." See also *West v. State,* 97 S.W.

2d 476 (Tex. 1936). In *Thomason v. State,* 265 S.W. 579 (Tex. 1924), the Court of Criminal Appeals defined "loud" as "marked by intensity, or relative intensity; not low, soft, or subdued." See also *West v. State, supra.* In all three cases, the convictions were reversed because the language used did not rise to the level of "loud and vociferous."

In holding that these definitions do not save the statute, we have considered the nature of the demonstrations that pervade our society today. The nature of these protest movements has convinced us that while the Texas definitions may suffice for non-first amendment situations, they are inappropriate in the free-speech arena. The modern demonstration involves hundreds or thousands of citizens marching along highways, picketing public accommodations or schools, or conducting mass meetings in parks or other public buildings. Although these protests create problems, the decisions clearly hold that the peaceful expression of views by demonstrations, marches, and assemblies are within the ambit of the First Amendment. See *Strother v. Thompson,* 372 F.2d 654 (5th Cir. 1967); *Guyot v. Pierce,* 372 F.2d 658 (5th Cir. 1967); *Hamer v. Musselwhite,* 376 F.2d 479 (5th Cir. 1967); *N.A.A.C.P. v. Thompson,* 357 F.2d 831 (5th Cir. 1966); *Wooten v. Ohlen,* 303 F.2d 759 (5th Cir. 1962). Indeed, it has been held that the individual must be afforded some appropriate "public forum" for his peaceful protests. See *Guyot v. Pierce, supra* at 661; Kalvan, The Concept of the Public Forum: *Cox v. Louisiana,* 1965 Sup. Ct. Rev. 1.

Two Supreme Court cases confirm that Texas's definition of "loud and vociferous" aborts the right to

express views by assemblies or demonstrations. In *Edwards v. South Carolina,* 372 U.S. 229 (1963), the protestors were arrested for "boisterous, loud, and flamboyant conduct" that created a breach of the peace. This conduct consisted of "loudly singing the Star-Spangled Banner and stamping their feet and clapping their hands." The Court held that the arrests violated their right to free speech and assembly. In *Cox v. Louisiana,* 379 U.S. 536 (1965), a large group marched to the courthouse where they listened to speeches, sang and prayed. The officials testified that the crowd got unruly after Cox in an "inflammatory manner" urged everyone to go downtown and sit in at the lunch counters. The "loud cheering and clapping of the students" was another reason for their arrests. This conduct was described as "a jumbled roar like people cheering at a football game"; loud cheering and spontaneous clapping and screaming and a great hullabaloo"; "a shout, a roar, and an emotional response in jubilation and exhortation." 379 U.S. at 546. In holding that such conduct did not constitute a breach of the peace, the Court noted that the testimony indicated that while the demonstration was loud, it was not disorderly. Because we are certain that the conduct in *Cox* and *Edwards* would be "loud and vociferous" within the Texas definitions, we hold that Texas has an overbroad definition of the offense when applied to activities fairly within first-amendment protection. Moreover, its scope could be used not only against demonstrations, but to curtail the street-corner orator that the authorities thought was too loud. The right to communicate ideas through speech and protests must carry with it the opportunity to win the attention of the public. The state may regulate that right only when

substantial state interest necessitates protection. This statute, however, would allow suppression without requiring that any substantial disturbance was imminent; or that the noise of the demonstration stifled the operations of the building picketed; or drowned out other speakers, *Turner v. Goolsby,* 255 F. Supp. 724 (S.D. Ga. 1966); or created a traffic or pedestrian movement problem.[1]

Therefore, the quantum of disruption necessary for the violation of Article 474 constitutes an "unwarranted abridgement of the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." See *Guyot v. Pierce, supra* at 66. Indeed, any demonstration considered by this court could be suppressed for its "loud and vociferous" manner under the Texas statute.[2] It

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[1]This statute does not therefore carve out of a demonstration that conduct which does not have First Amendment protection. For examples of conduct that does not have this protection, see *N.A.A.C.P. v. Thompson,* 357 F.2d 831 (5th Cir. 1966) (cannot obstruct traffic or block sidewalks); *Baines v. City of Danville,* 337 F.2d 579 (4th Cir. 1964) (could protest fact of segregated theaters but could not exclude others from use or have massive occupancy of the approaches); *Pritchard v. Downie,* 326 F. 2d 323 (8th Cir. 1964) (cannot have riotous conduct); *United States v. Aarons,* 310 F. 2d 341 (2d Cir. 1962) (cannot block launching of vessel); *Hurwitt v. City of Oakland,* 247 F. Supp. 995 (N.D. Cal. 1965) (a group of demonstrators could not insist upon the right to cardon off a street or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations).

[2]*Strother v. Thompson, supra; Guyot v. Pierce, supra; Hamer v. Musselwhite, supra; N.A.A.C.P. v. Thompson, supra; Pritchard v. Downie, supra; Baines v. City of Danville, supra; Cottonreader v. Johnson,* 252 F. Supp. 492 (M. D. Ala. 1966); *Hurwitt v. City of Oakland, supra; Williams v. Wallace,* 240 F. Supp. 100 (M.D. Ala. 1965); *United States v. Clark,* 249 F. Supp. 720 (S.D. Ala. 1965); *King v. City of Clarksdale,* 186 So. 2d 228 (Sup. Ct. Miss. 1966).

is these considerations, as well as the factors enumerated in our prior opinion that convince us that the breadth of Article 474 goes far beyond what is necessary to achieve a legitimate governmental purpose.

That does not, however, conclude our criticism, in terms of overbreadth, of the Texas statute; the definition of "loud and vociferous" does not end the interpretative problems created by Article 474. Not only do the Texas decisions convince us that Texas courts take seriously the requirement that the language be loud and vociferous, but they also, contrary to the Defendants' suggestion, indicate that Texas courts take seriously that part of Article 474 that prohibits the use of loud and vociferous language "in a manner calculated to disturb the person or persons present." In other words, to sustain a conviction, not only must the first element be present but there is the further requirement that the action be done in a manner calculated to disturb. A simple reading of the statute and a review of the cases make this second requirement apparent.

Article 474 prohibits "swearing and cursing . . . in a manner calculated to disturb. . . ." Is simply swearing and cursing sufficient for a conviction? Not according to *Young v. State,* 44 S.W. 507, 508 (Tex. 1898), where the Court of Criminal Appeals approved the following language:

> That the mere cursing or swearing or other language uttered is not the gist of the offense, but such cursing or swearing or use of other language must be in a manner reasonably calculated to disturb the people or a part of the people assembled at the public place. . . .

Article 474 prohibits "rudely displaying a pistol . . . in a manner calculated to disturb. . . ." In *Bell v. State,* 256 S.W.2d 108, 109 (Tex. 1953), the court stated:

> There is no offense known as "rudely displaying a pistol," but such may constitute a violation of the disturbing-the-peace statute, art. 474, Vernon's Ann. P.C., *when done in a manner calculated to disturb the peace.* (Emphasis added.)

And in *West v. State,* supra, at 473, a loud-and-vociferous language case cited by the Defendants, the Court of Criminal Appeals in its original opinion made it clear that more must be submitted to the jury than simply the question of loud and vociferous language:

> Whether or not appellant's conduct and the language used by him was such as was calculated to disturb the inhabitants at the time and place charged was a question for the jury to determine.

Indeed, the State's own argument concedes that the phrase "calculated to disturb the person or persons present . . ." has not been read out of the statute. The state has said that loud and vociferous language refers "to a course of conduct which creates so great an amount of noise that it was calculated to disturb the peace and tranquility of the occupants of a private residence or person in a public place." This contention undermines the State's original suggestion and reveals that the key to understanding the Texas statute is not the meaning of loud and vociferous, but the effect, in terms of quantum of disturbance, that the speech had on others. An examination of the Texas decisions shows that this quantum of disturbance is the same as that condemned in *Edwards* and *Cox.* E.g., *Woods v. State,*

213 S.W.2d 685, 687 (Tex. 1948), and *Head v. State,* 96 S.W.2d 981, 982-83 (Tex. 1936). These decisions prompted our original holding that the peaceful, orderly expression of views by marches or demonstrations cannot be interfered with, merely because the views expressed may be so unpopular at the time as to stir the public to anger, invite dispute, or create the chance of unrest. See *Hurwitt v. City of Oakland,* 247 F. Supp. 995 (N.D. Cal. 1965). See also *Brown v. Louisiana,* 383 U.S. 131, 147 (1966); *Cox v. Louisiana, supra* at 552. Thus the quantum of disturbance necessary for violation sweeps within its broad scope conduct protected by the First Amendment.

We emphasize again that our holding does not mean that Texas lacks the power to regulate demonstrations. These regulations on the time, place, and manner must be reasonable and implemented by a narrowly drawn statute.* Article 474 is not a reasonable regulation for deciding when the protest movements impinge on the peace and order of the community because it unduly circumscribes protected conduct under the guise of preserving public order.

For these reasons, the defendants' motion for new trial is OVERRULED and it is so ORDERED.

HOMER THORNBERRY
United States Circuit Judge

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*See *N.A.A.C.P. v. Thompson, supra; Baines v. City of Danville, supra; Pritchard v. Downie, supra; Turner v. Goolsby, supra; Cottonreader v. Johnson, supra; United States v. Clark, supra.*

ADRIAN A. SPEARS
Chief Judge, United States District Court

JACK ROBERTS
United States District Judge

FILED: May 31, 1968

CERTIFICATE OF SERVICE

I, Howard M. Fender, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Appendix to Jurisdictional Statement has been served on counsel for the Appellees by depositing same in the United States Mail, postage prepaid, addressed to Mr. Sam Houston Clinton, Jr., 308 West 11th, Austin, Texas 78701, this the 9th day of July, 1968.

HOWARD M. FENDER
Assistant Attorney General

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

NO. [redacted] 7

LESTER GUNN, ET AL.,

Appellants,

v.

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, ET AL.,

Appellees.

On Direct Appeal
From the United States District Court
Western District of Texas
Waco Division

MOTION TO AFFIRM

SAM HOUSTON CLINTON, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 269

LESTER GUNN, ET AL.,

Appellants,

v.

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, ET AL.,

Appellees.

On Direct Appeal
From the United States District Court
Western District of Texas
Waco Division

MOTION TO AFFIRM

Appellees respectfully move that the judgment sought to be reviewed on appeal be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and on such other grounds herein presented as reasons why the court should not set the case for argument.

JURISDICTION

While this is a suit seeking declaratory judgment and interlocutory and permanent injunctive relief on

grounds of the unconstitutionality of a state statute under 28 U.S.C. §2281 et seq., and the three-judge district court did declare the statute in question invalid, the district court did not enter an order in terms granting either an interlocutory or permanent injunction. Rather the district court held that appellees are *entitled* to "injunctive relief against the enforcement of Article 474 as now worded," but stayed its mandate and retained jurisdiction "pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements" (Appendix, p. 13). Nevertheless it is assumed that failure actually to grant injunctive relief does not deprive the Supreme Court of jurisdiction under 28 U.S.C. §1253; cf. similar procedure in *Reynolds v. Sims,* 377 U.S. 533, 586-587; 84 S.Ct. 1362, 1394 (1964).

STATEMENT OF THE CASE

Because inaccuracies and omissions in appellants' statement convey the erroneous impression that onus of wrongful acts is on others than appellants, a clarifying statement is necessary.

Central Texas College, where principal events in question occurred, "is situated near Killeen, Bell County, Texas" (Appendix, p. 2), but if it is "located on a portion of land comprising the Fort Hood Reservation," (Jurisdictional Statement, p. 4), the record does not show that. So regardless of what Bell County authorities may have "decided" two months after they had arrested, charged and confined appellees for allegedly disturbing the peace, "that the offense had

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[1] All emphasis is supplied throughout by the writer of this motion unless otherwise indicated.

occurred on a Federal enclave on which jurisdiction of criminal matters had been ceded to the Federal Government" (ibid., p. 5) is without support in this record.[5]

When appellees and their associates approached the site of the occasion, "(t)he first people that the group met were friendly, waving and taking pictures of the group with their signs" (Appendix, p. 3). Not until they "moved nearer to where the President was speaking" (id.) did the "air of hostility" (Jurisdictional Statement, p. 4) develop. That "air" quickly condensed into physical attacks upon appellees. Military police neither undertook to "arrest" them, nor turned them over to "the sheriff of Coryell County," nor were they "transferred to Copperas Cove in Coryell County" (Jurisdictional Statement, p. 4). Rather, one Bell County deputy and a state game warden helped a Killeen policeman handle one appellee (Fletcher Affidavit) and the other two were held by unidentified officers and led to a car (Butler Affidavit); when all three had been handcuffed and "frisked" they were put in "a fish and game commission car" and a state game warden and Bell County deputies "took the men to the Killeen police station and turned them over to the Killeen authorities" (Fletcher Affidavit).[6] When an-

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[5]Likewise, similar factual assertions regarding Federal jurisdiction and "arrests" by military police (Jurisdictional Statement, p. 7) are not only without support in the record but contrary to evidence therein and findings by the district court, as pointed out in the text of this statement of the case.

[6]See footnote 2, *supra*.

[6]Before gathering and filing affidavits of Bell County deputies, appellants had approved "Agreed Statement of Facts and Stipulations" filed in this case; therein is recounted that after being accosted appellees were "restrained" by military policemen, "turned over to Bell County deputy sheriffs," "taken to police cars, made to lean against a car, were

other Bell County deputy sheriff learned that events had occurred in Bell County, on direct orders from Bell County Sheriff Lester Gunn—one of the appellants—he filed complaints charging disturbing the peace (Strange Affidavit).

Under Texas law the Attorney General of Texas, who appeared and participated from the day suit was filed, is attorney not only for the State of Texas but also the Governor; Article IV, Section 22, Constitution of Texas; Article 4399, Vernon's Annotated Civil Statutes. Thus, even without direct notice the Governor of Texas has been continuously represented along with the State of Texas.

QUESTIONS ARE UNSUBSTANTIAL

Guided by opinions of the Supreme Court and following decisions of other courts in analogous situations, the district court carefully analyzed the statute in question in a context of its application to exercise of First Amendment rights and held it unconstitutional on two counts: first that it is void for "overbreadth:—"that is, that it offends the constitutional principle that 'a governmental purpose to control and prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms' "—and, second, that it is void for vagueness—that is, "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"—*Zwickler v. Koota,* 389 U.S. 241, 88 S.Ct. 391, 396 (1967). In reaching

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searched and handcuffed, after which they were . . . taken to the Killeen City Jail." Thus military police are not, as appellants subtly suggest, the "villians in the piece."

both conclusions the district court did indeed consider and apply interpretations placed on the statute by Texas appellate courts (Appendix, pp. 19-20, 23-25).

That the statutory language making it an offense for anyone who shall "go into or near any public place . . . and shall use loud and vociferous . . . language . . . or yell or shriek . . . in a manner calculated to disturb the person or persons present at such place'" may, and does, "sweep unnecessarily broadly and thereby invade the area of protected freedoms" is so clear from authoritative decisions that argument seems frivolous. See, e.g. *Cox v. Louisiana,* 379 U.S. 536, 85 S.Ct. 453 (1966); *Edwards v. South Carolina,* 372 U.S. 229, 83 S.Ct. 680 (1963); *Fields v. South Carolina,* 375 U.S. 44, 84 S.Ct. 149 (1964); *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900-905 (1940); see also *Brown v. Louisiana,* 383 U.S. 131, 86 S.Ct. 719; cf. *Thomas v. City of Danville,* 207 Va. 656, 152 S.E. 2d 265 (1967). That the Court of Criminal Appeals of Texas has limited application of statutory prohibition to use of language so "loud and vociferous" that it is "calculated to disturb the peace and tranquility of . . . persons in a public place" (Jurisdictional Statement, p. 6) does not prevent or save the statute from invading areas of protected freedoms. Such freedoms may be loudly and vociferously exercised yet still be protected, as they were held to be in *Cox, Edwards* and *Fields, supra.* For freedom of speech is "protected against censorship or punishment, unless shown likely to pro-

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[1] According to appellant Bell County Sheriff Gunn, he authorized deputy Strange to file disturbing the peace complaints upon being told that appellees "had gotten into a squabble with some soldiers and Military Police and had refused to leave; and that one of them had either *yelled* or had a sign saying something to the effect that 'Hitler's better than this,' or 'I like Hitler better'." (Gunn Affidavit)

duce a clear and present danger of a serious substantive evil that rises far above *public inconvenience, annoyance, or unrest," Terminiello v. City of Chicago,* 337 U.S. 1, 69 S.Ct. 894.

The statutory language, again as construed by the Court of Criminal Appeals of Texas, is also "void for vagueness." Even if "men of common intelligence" could agree on what amounts to "loud and vociferous language" by using definitions adopted from Webster (Appendix, pp. 19-20), still they must necessarily guess at and differ as to when same becomes "calculated to disturb the peace and tranquility of . . . persons in a public place" (Jurisdictional Statement, p. 6). Clearly this language is "a general and indefinite characterization" and leaves "to the executive and judicial branches too wide a discretion in its application," *Cantwell v. Connecticut, supra; Ashton v. Kentucky,* 384 U.S. 195, 200, 86 S.Ct. 1407 (1966); *Carmichael v. Allen,* 267 F.Supp. 985, 998-999 (N.D. Ga., 1966); *Baker v. Bindner,* 274 F.Supp. 658, 662-663 (W.D. Ky., 1967).

Thus the statute fails to meet the test of standards laid by decisions of the Supreme Court regarding "over-breadth" and "void for vagueness." Significantly, appellants can not—at least they do not—cite a single case that upholds their theory for overturning opinion and judgment of the district court. This dearth of support for appellants' position is a clear indication that not only is the district court correct in its opinion and judgment but also that there can be little or no argument about it.

Moreover, for reasons given and rationale explicated by the district court (Appendix pp. 4-9) the matter is far from moot. Even after particular charges of disturbing the peace were dismissed, appellees' prayer for

declaratory judgment and injunctive relief against future enforcement of Article 474 remained for determination. In the posture of this cause, as stated in *McGrath v. Kristensen,* 340 U.S. 162, 71 S.Ct. 224, 228 (1950), "The judgment sought in this proceeding would be binding and conclusive on the parties if entered and the question is justiciable."

Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116 (1965) is ample authority for a holding that appellees are "entitled . . . to injunctive relief against the enforcement of Article 474 as now worded," (Appendix, p. 13) upon facts found from overwhelming evidence of the "chilling effect" upon the exercise of First Amendment rights derived from appellants' acts and conduct relative to enforcement of the statute (Appendix, p. 8). This on that branch of *Dombrowski* sustaining challenges to state statutes "as overly broad and vague regulations of expression," 380 U.S. at 490-492; 85 S.Ct. at 1123-1124, which is the extent of the findings and conclusions of the district court below. Accordingly, appellants' reliance on *Cameron v. Johnson,* 390 U.S. 611, 88 S.Ct. 1335 and cases following it,* is misplaced.

Cameron v. Johnson, supra, returned to the Supreme Court after initial application of the absention doctrine prompting dismissal of the complaint had been vacated. 381 U.S. 741, 85 S.Ct. 1751, and remanded for reconsideration in light of *Dombrowski.* Upon remand, the district court first rendered declaratory judgment that the statute in question was not void on its face and then further found that sufficient irreparable injury to justify injunctive relief under the second branch of

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Zwicker v. Boll, 88 S.Ct. 1666 (1968) and *Brooks v. Briley,* 88 S.Ct. 1671 (1968), in both which the district court abstained from determining constitutionality of challenged laws.

Dombrowski had not been shown. Agreeing on both counts, the Supreme Court affirmed. However, in the instant case the district court rendered declaratory judgment that the statute in question *is* void on its face;[7] it did *not* decide whether the statute was being applied "for the purpose of discouraging protected activities."[8] Therefore, *Cameron v. Johnson* is plainly distinguishable and does not control entitlement to injunction in this case.

CONCLUSION

All the district court really did was to hold that Texas may not undertake to "preserve law and order" by imposing an ancient, archaic, dangerously broad and loosely drawn statute upon three of its citizens or others who do no more than exercise peaceably their First Amendment rights until set upon by others who disagree with the object of their cause. The court expressly adhered to "the right of the State of Texas to preserve law and order within its own boundaries" that appellants claim (Jurisdictional Statement, p. 9) and carefully followed precedent by referring the statute to the state legislature for corrective action (Appendix, p. 13), helpfully pointing out that such regulations "on the time, place, and manner must be reasonable and implemented by a narrowly drawn statute" (id., p. 25). Compare *Reynolds v. Sims, supra.*

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[7] A determination of appellees' prayer for declaratory judgment "independently of any request for injunctive relief against enforcement of the statute" was mandated by *Zwickler v. Koota, supra.*

[8] Though the issue of "bad faith" use of the statute was raised and, we think, adequately supported under all the facts and circumstances reflected by affidavits of appellees and others who witnessed the events.

WHEREFORE, for reasons stated judgment of the district court should be affirmed.

Respectfully submitted,

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Attorney for Appellees

CERTIFICATE OF SERVICE

I, Sam Houston Clinton, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Motion to Affirm has been served on counsel for appellants by depositing same in the United States Mail, postage prepaid, addressed to Honorable Crawford C. Martin, Attorney General of Texas, Attn.: Howard M. Fender, Assistant Attorney General, P. O. Drawer R, Capitol Station, Austin, Texas 78711, this ____ day of July, 1968.

SAM HOUSTON CLINTON, JR.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 269

LESTER GUNN, ET AL.,
Appellants

Vs.

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, ET AL.
Appellees

On Direct Appeal From the United States District Court
Western District of Texas
Waco Division

APPELLANTS' BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

A.

This is an appeal from the Opinion and Judgment of the United States District Court for the Western District of Texas, Waco Division, sitting as a Three Judge Federal Court in Cause No. 67-63-W on the docket of said court, same being not yet reported. A copy of the original opinion and a copy of the addendum opinion issued following the overruling of motion for new trial are contained in the Single Appendix.

B.

The Trial Court issued its original opinion on April 10, 1968. The order denying motion for new trial was entered April 30, 1968. Notice of appeal was filed on

May 6, 1968. The Trial Court issued its "Addendum on Motion for New Trial" on May 31, 1968. Appellant filed a Jurisdictional Statement on July 3, 1968, invoking 28 U.S.C. §1253 as grounds for the appeal. This Court noted jurisdiction on October 14, 1968.

C.

1. The United States Constitutional provisions involved are the First Amendment thereto, to-wit:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

and Section I of the Fourteenth Amendment thereto, to-wit:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Texas Statute involved is Article 474 of the Penal Code of Texas which may be found in Volume 1 of Vernon's Penal Code of the State of Texas, at page 491, and states as follows:

> Whoever shall go into or near any public place or into or near any private house, and shall use loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or yell or shriek or expose his or her person to another person of the age of sixteen (16) years or over, or rudely dis-

play any pistol or deadly weapon, in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200.).

D.

The following questions are presented by this appeal:

1. Did the Trial Court err in failing to grant Defendant's motion to dismiss?

2. Did the Trial Court err in declaring Article 474, Vernon's Texas Penal Code unconstitutional on its face?

3. Did the Trial Court err by failing to accept and apply Texas decisions construing and limiting Article 474, Texas Penal Code, in reaching its conclusions of overbreadth?

4. Did the Trial Court err in failing to grant defendant's motion for new trial for failure to perfect jurisdiction in that five days written notice of the hearing was not served on the Governor of Texas as required by 28 U.S.C., Section 2284(2)?

E.

On December 12, 1967, the President of the United States was scheduled to make an inspection of Fort Hood, a United States Army installation located near Killeen, Texas. Killeen is a community of some 30,000 population and is located in Bell County which contains two larger cities, Belton (the county seat) and Temple (the largest city).

On December 11, 1967, area news media released the announcement that the President would make a speech at the dedicatory program of Central Texas College, a new institution located on a portion of the land com-

prising the Fort Hood military reservation. From the surrounding area and from among the nearly 70,000 soldiers and their dependents at Fort Hood a crowd of approximately 25,000 gathered to hear the President's address. (App. p. 36.)

The Secret Service Agents responsible for safeguarding the President had requested assistance from the Sheriff of Bell County, the Sheriff of Coryell County (adjoining Bell County and containing a portion of the Fort Hood reservation), the Chief of Police of Killeen and the Provost-Marshall of Fort Hood. Some personnel from each of these offices were present in response to such request. (App. p. 71.)

The University Committee to End the War in Viet Nam is an unincorporated voluntary association mostly composed of people who are residents of Austin, Texas, and its environs. Their purpose is to protest the conduct of the war in Viet Nam. Austin is located some 67 miles by road from Killeen. When some committee members learned of the President's speech on the morning of December 12, they hastily gathered a group of several carloads of committee members and sympathizers to drive to Killeen to hear the speech and to express their views to the assembled crowd by placards or other means available to them. They arrived after the President had begun talking.

After choosing their placards they proceeded towards the speaking. There were many uniformed service personnel present including a number of returned Viet Nam war veterans. (App. p. 37.) an air of hostility developed promptly but the protestors decided to push on. (App. p. 37.) (App. p. 83.) The court below specifically declined to rule on whether or not they should have realized that their continued approach might cause a disturbance or even violence. (App. p. 83.)

Several uniformed soldiers attacked the group of protestors and tore up their signs. (App. p. 37.) Also some of the protestors were roughed up, although no serious injury was inflicted (perhaps because of the prompt intervention by military police standing nearby). (App. p. 71.) The military police arrested the three named plaintiffs. (App. p. 37.)

Lester Gunn, Sheriff of Bell County, and Sheriff Cummings, of Coryell County, were standing near the speakers platform when a Killeen policeman ran by, telling them there was a disturbance over on the edge of the crowd. These two officers went immediately to the scene and found that the three men had already been arrested by the military police and taken away to Copperas Cove (in Coryell County). Later, it was decided that the disturbance had been in Bell County and by radio Sheriff Gunn authorized his deputy to file disturbance charges against the three. After arrival at the Bell County jail the three men were allowed to use the telephone and in about an hour an attorney arrived and made their bond. (App. p. 71.)

There is no indication of what disciplinary action may have been taken towards the soldiers involved in the disturbance.

On December 19, 1967, the instant case was filed and a temporary restraining order granted prohibiting the prosecution of the charges against the three men. On February 13, 1968, the charges against the three men were dismissed on the grounds that the disturbance occurred on a federal enclave on which jurisdiction of criminal matters had been ceded to the Federal Government and thus the Justice of the Peace Court was without jurisdiction. (App. pp. 16-24.)

On February 14, 1968, the Defendants filed a motion to dismiss on the grounds that all questions had become

moot with the disappearance of the criminal charges and that there was no longer any controversy before the court. (App. p. 16.)

The Three-Judge Court carried the motion to dismiss along with the merits of the case and heard everything simultaneously on February 23, 1968. At no time was any notice given to the Governor of Texas that this hearing was to be held or of the subject matter that purportedly formed the basis for a controversy.

After the hearing, the court ruled that Article 474 was unconstitutional on its face. The opinion discusses only the use of "loud and vociferous language." But the holding is not limited to this portion. The court below simply stated that:

> "We reach the conclusion that Article 474 is impermissably and unconstitutionally broad."

and then went on to stay their mandate until the next session of the legislature to permit the enactment of "such disturbing-the-peace statute as will meet constitutional requirements."* The court overruled the the Motion to Dismiss. (App. p. 81.)

Defendant then filed a motion for new trial with particular emphasis on State Court constructions of Article 474. The Trial Court overruled the motion for new trial but subsequently issued its "Addendum on Motion for New Trial. (App. p. 108.) From all of this Defendant (Appellant hereafter) appeals.

F.

As to each of the points raised on appeal, Appellant

*The Texas Legislature has met and adjourned since the opinion was issued and took no action to amend Art. 474 or any other penal statute in the "disturbing-the-peace" field.

here re-states these points with a summary of argument for each point.

POINT 1 RESTATED

Did the Trial Court err in failing to grant Defendant's motion to dismiss?

Appellant urges that the dismissal of State criminal charges in the Justice of the Peace Court on a proper legal basis left the U. S. District Court with no "controversy" (in the absence of some affirmative showing of a contemplated, continuing course of abusive conduct) so that any action by the U. S. District Court thereafter was merely an "advisory opinion" and thus beyond its powers.

POINT 2 RESTATED

Did the Trial Court err in declaring Article 474, Vernon's Texas Penal Code unconstitutional on its face?

Appellants urge that Article 474 does not infringe upon the right of anyone to express his ideas (whether such ideas be popular or unpopular) but on the contrary that the sole purpose of Article 474 is to establish certain standards of *prohibited conduct,* violations of which are inimical to an orderly society and the enforcement of which is necessary to "insure domestic tranquility." Appellant urges that the terms used in Article 474 are clear and understandable to all.

POINT 3 RESTATED

Did the Trial Court err by failing to accept and apply Texas decisions construing and limiting Article 474, Texas Penal Code, in reaching its conclusions of overbreadth?

Appellant urges that under applicable decisions of this and inferior Federal Courts, the Trial Court in the

instant cause is legally required to accept the constructions and definitions promulgated by Texas Courts in passing on Texas statutes. Since Texas decisions make it clear that violations of Article 474 are measured in terms of *conduct* not the *ideas expressed,* the Trial Court should have limited their considerations in like manner.

POINT 4 RESTATED

Did the Trial Court err in failing to grant defendant's motion for new trial for failure to perfect jurisdiction in that five days written notice of the hearing was not served on the Governor of Texas as required by 28 U.S.C., Section 2284(2)?

Appellant urges quite simply that this is a jurisdictional matter based primarily on comity between sovereigns.

G.

ARGUMENT

POINT 1 RESTATED

Did the Trial Court err in failing to grant Defendant's motion to dismiss?

This Court has long recognized that there must be an actual controversy before a Federal Court before jurisdiction attached for the holding of a hearing. Appellee sought a declaratory judgment in the instant case under the provisions of Title 28, U.S.C.A., § 2201 which provides, *inter alia* ". . . in a case of actual controversy within its jurisdiction . . ." In view of the facts in this case—the arrest by the U.S. Military Police, the prompt release of those arrested on bond and the subsequent dismissal of the criminal charges in the Justice of the Peace Court (which criminal charges formed the basic subject matter of Appellees

Original Complaint)—no "actual controversy" existed at any time following such dismissal.

In *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, decided March 26, 1962, the Supreme Court recognized the principle at 369 U.S. 204 that:

> "A federal court cannot 'pronounce any statute, either of a state or of the United States void, because irreconciable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' Liverpool, N.Y. & P. Steamship Co. v. Commissioners of Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899."

In *Cargill, Incorporated v. United States,* 188 F.Sup. 386, the plaintiff was complaining that certain actions by an agency of the United States government were invasions of his constitutional rights. The question was raised before the three judge federal court that:

> ". . . and that the Commission will probably enter a final order of dismissal to make the matter 'moot' before this Court can hear and decide the issues and that such practice, too, has been followed in the past and is continuing to plaintiffs' damage."

In disposing of the matter, the Court said:

> "It is the duty of this Court to 'decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293. This principle was recently restated by the Supreme Court in the case of Local No. 8-6, Oil, Chemical & Atomic Wkrs. v. Missouri, 361 U.S. 363, 80 S.Ct. 391, 4 L.Ed. 2d 373." . . .

" 'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.' Amalgamated Ass'n. etc. v. Wisconsin Emp. Rel. Bd., 340 U.S. 416, 418, 71 S.Ct. 373, 375, 95 L.Ed. 389. The very proposition here was involved in two recent decisions wherein the Supreme Court of the United States remanded three-judge court opinions with directions to dismiss for mootness. See Dixie Carriers, Inc., v. U.S., D.C., 143 F.Supp. 844; Atchison, T & S.F.R. Co. v. Dixie Carriers, Inc., 355 U.S. 179, 78 S. Ct. 258, 2 L.Ed. 2d 186, and Amarillo-Borger Express v. United States, D.C. 138 F.Supp. 411; Id., 352 U.S. 1028, 77 S.Ct. 594, 1 L.Ed.2d 598.

"The same reasoning applies to the prayer for declaratory judgment relief. Section 2201, Title 28 U.S.C., creates a remedy 'In a case of actual controvery within its jurisdiction, * * *' "

See also *Griese v. Combs,* 183 F.Supp. 705; *Continental Nut Company v. Benson,* 166 F.Supp. 142; *Audiocasting, Inc. v. State of Louisiana,* 143 F.Supp. 922.

In the Trial Court's Opinion overruling the Motion to Dismiss, the Trial Court relied heavily on *Dombrowski v. Pfister,* 380 U.S. 479 and *Zwickler v. Koota,* 389 U.S. 241. Appellants have urged throughout the entire proceedings and urge now to this court that *Dombrowski* and *Zwickler* are not applicable. Nowhere in the record is there a showing of a course of conduct by Appellants (or by any enforcement officials of the State of Texas or any of its subdivisions) whereby any of Appellees (or any other person or group similarly situated) was threatened with or subjected to systematic enforcement of Article 474 to prohibit free expression (or for any purpose). In fact, the record reflects that the arrests which gave rise to this case were made by federal military police, and not state or coun-

ty officers, following an altercation. The arrests were not as a result of anything said by appellees, but were based solely on their conduct.

Absent threat of future arrest and absent a showing of a concerted plan to harass Appellees by state officers, Appellants urge that the instant case should be governed by the rationale and holding expressed by this court in *Cameron v. Johnson,* 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed. 2d 683 (1968).

And in relying on *Cameron,* Appellants point out the definition appearing in the dissenting opinion written by Mr. Justice Fortas which states:

> "I agree that the statute in question is not 'unconstitutional on its face.' But that conclusion is not the end of the matter. *Dombrowski* stands for the proposition that 'the abstention doctrine . . . is inappropriate for cases . . . where . . . statutes are justifiably attacked on their face as abridging free expression, *or as applied for the purpose of discouraging protected activities.*' 380 U.S., at 489-490. (Emphasis added.)
>
> *Dombrowski* establishes that the federal courts will grant relief when 'defense of the state's criminal prosecution will not assure adequate vindication' of First Amendment rights. 380 U.S., at 485. According to *Dombrowski,* this condition exists when the State has invoked the criminal law in bad faith and for the purpose of harassing and disrupting the exercise of those rights. Federal courts are available to enjoin the invocation of state criminal process when that process is abusively invoked 'without any hope of ultimate success, but only to discourage' the assertion of constitutionally protected rights. 380 U.S., at 490. See also *City of Greenwood v. Peacock,* 384 U.S. 808, 829 (1966).
>
> *Dombrowski* is strong medicine. It involves interposition of federal power at the threshold stage

of the administration of state criminal laws. *Dombrowski's* remedy is justified only when First Amendment rights, which are basic to our freedom, are imperiled by calculated, deliberate state assault. And those who seek federal intervention bear a heavy burden to show that the State, in prosecuting them, is not engaged in use of its police power for legitimate ends, but is deliberately invoking it to harass or suppress First Amendment rights. *Dombrowski* should never be invoked when the State is, in substance and truth, engaged in the enforcement of valid criminal laws. Ordinarily, the presumption that the State's motive was law enforcement and not interference with speech or assembly will carry the day.

The dissent then goes on to describe the course of action which Mr. Justice Fortas feels would bring *Dombrowski, supra;* into play. There is no such course of action, actual or threatened, in the instant record.

See also *Zwicker v. Boll,* 270 F.Supp. 131, aff. 391 U.S. 353.

Appellants earnestly urge that the Trial Court erred in failing to grant the Motion to Dismiss.

POINT 2 RESTATED

Did the Trial Court err in declaring Article 474, Vernon's Texas Penal Code unconstitutional on its face?

The Opinion and Judgment of the Trial Court is not clear as to whether Article 474 is unconstitutional in whole or in part. This arises from the fact that the court below limited its discussion at one point to "loud and vociferous language."

The conclusion in the order makes it appear that Article 474 in its entirety has been ruled unconstitutional by the Trial Court. We do not believe that such

a result was intended. This discussion consequently, like that of the Trial Court's Order, will be largely limited to the phrase "loud and vociferous language" and the phrase "in a manner calculated to disturb the person or persons present at such place or house."

In its Opinion and Order, the Trial Court specifically eliminated the question of the constitutionality of the application of Article 474 and with equal specificity limited its concern to the determination of whether the statute was constitutionally defective on its face as being overly broad.

Examination of previous decisions of this court involving vagueness and overbreadth in First Amendment areas shows that they turn on a common rationalizing principle. A statute is unconstitutional overbroad if it allows a speaker to be punished because those in authority do not like the ideas he has expressed. The statute is valid, even though its terms are general and imprecise, if its application is not dependent on the content of the speech. In this connection we direct the attention of this court to Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L.Rev. 67 (1960) cited on several occasions by this court.

The leading example of a case in which state laws was held unconstitutionally overbroad and indefinite is *Edwards v. South Carolina,* 372 U.S. 229 (1963). In that case there was not even a statute involved. Defendants were prosecuted for the common-law crime of breach of the peace, and the state court had said that this offense was "not susceptible of exact definition." The state court gave the offense a broad construction, and this could not stand. The same vice was present in *Cox v. Louisiana* 379 U.S. 536 (1965). There it was a statute, rather than a common-law crime, that

was involved, but the statute had been construed by the state court in the same fashion as had the common-law crime in *Edwards.*

> "The Louisiana Supreme Court in this case defined the term 'breach of the peace' as 'to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet.' 244 La. at 1105, 156 So.2d at 455. In Edwards, defendants had been convicted of a common-law crime similarly defined by the South Carolina Supreme Court. Both definitions would allow persons to be punished merely for peacefully expressing unpopular views."

379 U.S. at 551. The common-law crime of criminal libel was held unconstitutionally indefinite for the same reason in *Ashton v. Kentucky,* 384 U.S. 195 (1966).

In *Baggett v. Bullitt,* 377 U.S. 360 (1964), a loyalty oath was held invalid because it depended on a definition of "subversive person" so broad that it could be read to include one who has endorsed a Communist candidate for office or a lawyer who represented a Communist or a journalist who defended the constitutional rights of Communists. A similar definition of "subversive person" was at the heart of the Louisiana statutes struck down in *Dombrowski v. Pfister, supra.*

The ordinance held invalid in *Carmichael v. Allen,* 267 F.Supp. 985 (N.D.Ga. 1967), purported to make it a crime "to do anything tending to disturb the good order, morals, peace or dignity of the City." As the three-judge court quite correctly observed, at 998, this ordinance was broader even that the definition of breach of peace in the *Edwards* case.

This same vice, that the statute permits expression to be prohibited merely because someone does not like the content of what is being said, has been the test also in the censorship cases. The ordinance held un-

constitutional in *Gelling v. Texas,* 343 U.S. 960 (1952), prohibited showing of any movie "of such character as to be prejudicial to the best interests of the people of said city." In its most recent expression, in *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676 (1968), the Court said:

> "The term 'sexual promiscuity' is not there defined and was not interpreted in the state courts. It could extend, depending upon one's moral judgment, from the obvious to any sexual conducts outside a marital relationship."

Compare, on the other hand, those cases in which laws have been upheld against claims of vagueness. an ordinance prohibiting any "parade or procession upon any public street" without a license was held valid on its face since the state court had construed it as requiring that licenses be granted on a non-discriminatory basis and as allowing only considerations of time, place, and manner so as to serve the public convenience. *Cox v. New Hampshire,* 312 U.S. 569 (1941).

A New Hampshire statute coming under attack the following year provided that "no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name * * *." This, the Court said, was

> ". . . a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. * * * This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law."

Chaplinsky v. New Hampshire, 315 U.S. 568, 573-574 (1942).

In *Feiner v. New York,* 340 U.S. 315 (1951), this Court upheld a criminal conviction for violation of the following statute:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
>
> 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> 3. Congregates with others on a public street and refuses to move on when ordered by the police; * * *."

Federal and state statutes prohibiting "obscene or indecent" matter were upheld against a vagueness attack in *Roth v. United States,* 354 U.S. 476, 491 (1957), the Court saying:

> "The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere. Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process."

In *Cox v. Louisiana,* 379 U.S. 559, 562 (1965), the following statute was described as "a precise, narrowly drawn regulatory statute which proscribes certain specific behavior" and it was held valid on its face:

> "Whoever, with the intent of interfering with, obstructing, or impeding the administration of

> justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana * * *."

The Court recognized that "there is some lack of specificity in a word such as 'near'," *id.* at 568, but said:

> "This administrative discretion to construe the term 'near' concerns a limited control of the streets and other areas in the immediate vicinity of the courthouse and is the type of narrow discretion which this Court has recognized as the proper role of responsible officials in making determinations concerning the time, place, duration, and manner of demonstrations. * * * It is not the type of unbridled discretion which would allow an official to pick and choose among expressions of view the ones he will permit to use the streets and other facilities * * *."

id. at 569.

An ordinance clearly invalid on its face was saved by the limiting construction it had been given by the state courts, in *Shuttlesworth v. City of Birmingham,* 382 U.S. 87 (1965). The Court first discussed, at 90, the facial invalidity of the ordinance:

> "Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration."

It then discussed the construction put on the ordinance by the state courts and said, at 91:

> "The Alabama Court of Appeals has thus authoritatively ruled that § 1142 applies only when a person who stands, loiters, or walks on a street or sidewalk so as to obstruct free passage refuses to obey a request by an officer to move on. It is our duty,

of course, to accept this state judicial construction of the ordinance. * * * As so construed, we cannot say that the ordinance is unconstitutional though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied."

More recently, in *Adderley v. Florida,* 385 U.S. 39 (1966), the Court upheld a statute prohibiting "every trespass upon the property of another, committed with a malicious and mischievous intent." This Court distinguished the *Edwards* and *Cox* cases, on the ground that they had involved indefinite, loose, and broad charges. The statute before it was not invalid for vagueness or overbreadth, because "there is no lack of notice in this law, nothing to entrap or fool the unwary." *Id.* at 42.

On April 22nd of this year this Court upheld the definition of "obscenity harmful to minors" in a New York censorship statute since it was said to be virtually identical with the Court's own most recent statement of the elements of obscenity. Incorporation of this test in a statute was said to give "men in acting adequate notice of what is prohibited." *Ginsberg v. New York,* 390 U.S. 629 (1968).

On the same day, in a case of very great importance in deciding the present case, the Court upheld a Mississippi statute making it unlawful

> "... for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to or from any public premises * * * or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or unreasonably interfere with free use of public streets, sidewalks, or other public ways adjacent or contiguous thereto."

This, the Court said, "clearly and precisely delineates its reach in words of common understanding." The Court also rejected the argument that the statute was overly broad. *Cameron v. Johnson,* 390 U.S. 611 (1968).

The following words and phrases are hardly models of precision, yet they have been held constitutionally valid in the cases just reviewed:

"congregate with others"

"interfering with, obstructive, or impeding"

"Mischievous intent"

"near"

"obscene or indecent".

"obstruct free passage"

"obstruct or unreasonably interfere"

"offensive, derisive or annoying"

"parade or procession"

"picketing or mass demonstrations"

It is plain that the Court does not require of the states that criminal statutes be drawn with the precision of the multiplication tables, and that, even when First Amendment freedoms are implicated, the states need not delineate the forbidden conduct by metes or bounds. A statute will be struck down for constitutional overbreadth only if on its face, or as construed by the state courts, it openly invites punishment for the expression of unpopular ideas. We again direct the attention of this Court to the fact that the arrests of the appellees were made by Federal Military Police, not for anything they had said, but because they had engaged in an affray with military personnel.

Other recent cases of inferior courts that have followed the above rationale in this interpretation of the

recent decisions of this Court are: *United States v. Woodard, et al.*, 376 F.2d 136 (7th Circuit, 1967); *Barber v. Kinsella,* 277 F.Supp. 72; *Wright v. City of Montgomery,* 282 F.Supp. 291 (1962); *Johnson v. Lee,* 281 F.Supp. 650 (1968).

To return to decisions of this Court, appellant relies finally on *Zwicker v. Boll,* 391 U.S. 353 (1968). The short *per curiam* opinion is of value only when read in conjunction with the Jurisdictional Statement and the Motion to Affirm. A fact situation, a statute and a constitutional attack similar in most respects to the instant case reveal that *Zwicker* is compelling authority for reversal of the instant case.

The Wisconsin Disorderly Conduct statute (Wis. Stats. § 947.01) states:

> "Wis. Stats. § 947.01. Disorderly Conduct—Whoever does any of the following may be fined not more than $100 or imprisoned not more than 30 days: (1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance."

A suit was filed alleging unconstitutionality under the First Amendment for both vagueness and overbreadth. The Three-Judge Federal Court held against the plaintiffs and appeal was taken to this Court, which affirmed the Trial Court.

When the facts of the instant case are applied to the rationale of the dissent in *Zwicker* by Mr. Justice Douglas it becomes apparent that the instant cause does not even fall within the dissent because there is no showing in the instant record of any harassment, bad faith, or discrimination.

A

POINT 3 RESTATED

Did the Trial Court err by failing to accept and apply Texas decisions construing and limiting Article 474, Texas Penal Code, in reaching its conclusions of overbreath?

The courts of the State of Texas have interpreted the Texas disturbing-the-peace statutes (Article 474 and its predecessors) and have limited by construction the purposes for which the statute may be employed.

In the early case of *Anderson v. State,* 20 S.W. 358 (1892), the Court said:

> "The Statute says loud and vociferous not loud or vociferous language. Webster defines 'vociferous' thus: 'Making a loud outcry; clamorous; noisy, as, vociferous heralds.' 'Vociferously:' 'With great noise in calling; shouting,' etc. Do the facts in this record show with reasonable certainty that appellant used loud and vociferous language? . . . This loud language, if it be such, was used in a house in which quite a number of persons were assembled, and it is passing strange that no witness could be found who could give us a criterion or fact by which we could determine whether the language was loud and vociferous or not. How could it have been loud when quite a number state they were present, and could not hear what was said? If vociferous, it could have been heard by all in the house at least. We are of the opinion that the evidence does not establish with reasonable certainty the fact that the appellant used loud and vociferous language in such manner as was calculated to disturb the persons assembled at the house; wherefore the judgment is reversed, and the cause remanded."

In the case of *Thomason v. State,* 265 S.W. 579 (1924) the Court said in relation to a complaint that defendant was guilty of using loud or vociferous lan-

guage that loud "when speaking of sound" is defined in the dictionary as "marked by intensity or relative intensity; not low, soft or subdued." "Vociferous" is defined as "making a loud outcry; clamorous; noisy," and is synonymous with brawling or turbulent. In this case, the Court reversed the conviction of the defendant, who was talking during a religious service in a church, as the complaining witness was not even able to distinguish the words said. For this reason it was held that the language could not have been in a loud and vociferous manner within the meaning of the statute. To like effect is *West v. State,* 97 S.W.2d 476 (1936).

By the above decisions, the Court of Criminal Appeals has limited the conviction for the use of "loud and vociferous language" to a course of conduct which creates so great an amount of noise that it was calculated to disturb the peace and tranquility of the occupants of a private residence or persons in a public place. This interpretation by the Court of Criminal Appeals eliminates entirely under this Section of the Statute any offense based on the content of the words used and does not attempt to restrict the thoughts to be conveyed in violation of the First Amendment. It merely attempts to limit the manner in which the words are spoken.

The court below apparently has ignored these and other limiting Texas decisions and has instead substituted its own interpretations. Appellants urge that this is error. These interpretations of Texas law are binding on the Federal Courts in their consideration of the issues covered by such opinions. *Cox v. New Hampshire,* 312 U.S. 569; *Poulos v. New Hampshire,* 345 U.S. 395; *Shuttlesworth v. City of Birmingham,* 382 U.S. 87; *Cox v. Louisiana,* 379 U.S. 538.

POINT 4 RESTATED

Did the Trial Court err in failing to grant defendant's motion for new trial for failure to perfect jurisdiction in that five days written notice of the hearing was not served on the Governor of Texas as required by 28 U.S.C., Section 2284(2)?

Section 2284 of Title 28 of the United States Code Annotated sets up the composition and procedure for a hearing by a three-judge federal court. Subdivision (2) states:

> "(2) If the action involves the enforcement, operation or execution of state statutes or state administrative orders, at least five days notice of the hearing shall be given to the Governor and Attorney General of the state."

No notice was given to the Governor of Texas.

In Cyclopedia of Federal Procedure, Third Edition, 1965 Revised Volume, in Volume 14a at page 342 in Section 73.107 under the heading Notice of Hearing the following appears:

> "If the action involves the enforcement operation or execution of a state statute or administrative order, at least five days' notice of the hearing shall be given to the governor and attorney general of the State. This notice is jurisdictional."

Cited as authority for the foregoing is *Crescent Manufacturing Company v. Wilson*, 242 F. 462. In the Crescent case at page 464 the following appears:

> "When application for the injunction was presented to the District Judge it was incumbent upon him to call to his assistance two other judges, one of whom should be a Justice of the Supreme Court or a Circuit Judge, to hear and determine the application. And it was also his duty to give notice of the hearing to the Governor and Attor-

ney General, as well as to such other persons as may be defendants in the suit."

Furthermore, in *Arneson v. Denny, et al.*, 25 F.2d 993 the question was raised even after certain notice had been given to both the Governor and the Attorney General of the State of Washington. There the Court held that not only must some notice be given but that the Governor should be informed of the particular law of the State of Washington, enforcement of which was sought to be enjoined, upon what grounds such law was claimed to be unconstitutional, and the time when the Defendants would be served with copies of the court's order, complaint, and motion. At Page 995 of the *Arneson* Opinion the following language appears:

> "It may be that the Attorney General has waived any defect in the notice, but the question remains as to the sufficiency of the notice served upon the Governor."

It seems altogether proper that the Congress should provide for notice to the Governor since an adverse ruling would affect law enforcement throughout the state and the Governor should be put on notice to take whatever steps are necessary to safeguard the lives and property of all people in the state. Since the Trial Court did not comply with this statute in the instant cause, Appellant urges that jurisdiction was lacking to enter the order and judgment of April 10, 1968.

WHEREFORE, premises considered, Appellant urges this Court to reverse the holding of the United States District Court for the Western District of Texas in the instant cause and to hold that Article 474, Texas Penal Code is valid and enforceable under the Constitution of the United States, particularly as construed and defined by the Texas courts or in the alternative to hold that the United States District Court

for the Western District of Texas had no jurisdiction of the instant cause because same had become moot or because no proper notice had been given to the Governor of Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Howard M. Fender, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Appellants' Brief has been served on counsel for the Appellees by depositing same in the United States Mail, postage prepaid, addressed to Mr. Sam Houston Clinton, Jr., 308 West 11th, Austin, Texas 78701, this the —— day of ———, 1968.

HOWARD M. FENDER
Assistant Attorney General

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 7

LESTER GUNN, *et al.*,

Appellants,

—v.—

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, *et al.*,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION

BRIEF FOR APPELLEES

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—v.—

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, *et al.*,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION

BRIEF FOR APPELLEES

Opinion Below

This is an appeal from the Opinion and Judgment of the District Court for the Western District of Texas, Waco Division, holding that Appellees are entitled to declaratory and injunctive relief against Article 474 of the Texas Penal Code. That Opinion and Judgment are reported at 289 F. Supp. 469 (1968) and are reproduced in the Joint Appendix at page 81. An Addendum Opinion subsequently issued is also reported at 289 F. Supp. 469 and reproduced in the Appendix at page 108.

Jurisdiction

The initial opinion below was filed April 10, 1968. A Notice of Appeal was filed May 6, 1968. The Addendum Opinion of the district court was filed on May 31, 1968. The Jurisdictional Statement herein was filed on July 3, 1968, and jurisdiction was noted on October 14, 1968. Jurisdiction of this appeal is conferred on this Court by Title 28 U. S. C., Section 1253.

Statutes Involved

Article 474, Texas Penal Code:

> "Whoever shall go into or near any public place or into or near any private house, and shall use loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or yell or shriek or expose his or her person to another person of the age of sixteen (16) years or over, or rudely display any pistol or deadly weapon, in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200.)."

Statement of the Facts

The following salient facts were either omitted from or insufficiently developed in the Appellants' brief:

The University Committee to End the War in Viet Nam is an unincorporated association of residents of Austin, Texas, and its environs. The Committee's purpose is "to

protest the conduct of the war in Viet Nam by means of discussions, publications, demonstrations, and non-violent direct action . . . ." (Appendix Opinion, p. 81.)

On the occasion at issue, the appellees, members and friends of the University Committee,[1] appeared at Central Texas College,[2] where President Lyndon Johnson was to speak, to silently, and by carrying signs, protest the government policy in Viet Nam. (See Appendix, Complaint, p. 7.) As appellants correctly note, on the day in question, appellees arrived at the College, chose their protest signs, and proceeded to move toward the crowd listening to the speaker (Appellants' Brief, p. 4). An "air of hostility" developed and "(s)everal uniformed soldiers attacked the group of protesters and tore up their signs" (Appellants' Brief, pp. 4-5). One of the marchers, as a result of the attack, was bleeding at the mouth (Appendix, p. 46), another was "struck to the ground" (Appendix, p. 53), another was "boxed . . . in the right ear" and his arms were "pinned back . . . so that someone else could hit him" (Appendix, p. 59). The protest signs were completely destroyed (Appendix, pp. 46, 53, 59, 65, 79). Several of the demonstrators were manhandled by the arresting authorities on the scene

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[1] Uncontradicted affidavits put their number at approximately seven persons arriving in two cars (Appendix, pp. 40, 45, 52, 58, 63, 64).

[2] The criminal charges were dismissed subsequent to the filing of this action on the ground that the alleged offenses had occurred on a federal enclave, to which criminal jurisdiction had been ceded by the State of Texas. The events in question occurred on the grounds of Central Texas College. If such grounds are in fact on a portion of land comprising Fort Hood Reservation there is no support whatever in the record for that allegation.

(Appendix, pp. 41-42, 53, 60). Those not arrested were ordered to leave[3] (Appendix, pp. 60, 66, 71).

There is one critical factual omission which must by now be evident. The appellants at no time have ever alleged that the appellees did anything other than walk toward the crowd while *silently* carrying signs. There is not a single shred of evidence that appellees, prior to the attack upon them by the soldiers, ever spoke at all, not to mention that they never spoke in a "loud and vociferous, or obscene, vulgar, or indecent" manner. Indeed, appellants squarely state at page 11 of their Brief, "The arrests were not as a result of anything *said* by appellees, but were based solely on their *conduct*." (Emphasis added.)

The evidence adduced by the State, in its most specific form, alleges that the sheriff "was standing on the steps of the speaker's platform, when a policeman from Killeen came by and told me there was some trouble over on the edge of the crowd" (Appendix, p. 71). The Sheriff's affidavit continues, "I went over there but by the time I got there, a car was driving off which I understand contained

[3] Appellants have suggested that "military police arrested the three named plaintiffs" (Brief for Appellants, p. 5). Military police neither undertook to "arrest" them, nor turned them over to the sheriff of Coryell County. Rather, one Bell County deputy and a state game warden helped a Killeen policeman handle one appellee (Fletcher's Affidavit) and the other two were held by unidentified officers and led to a car (Butler's Affidavit); when all three had been handcuffed and "frisked" they were put in "a fish and game commission car" and a state game warden and Bell County deputies "took the men to the Killeen police station and turned them over to the Killeen authorities" (Fletcher's Affidavit). When another Bell County deputy sheriff learned that events had occurred in Bell County, on direct orders from Bell County Sheriff Lester Gunn, he filed complaints charging disturbing the peace (Strange's Affidavit).

at least two of the people against whom complaints were later filed" (Appendix, p. 71). He added:

> I did not have the names of any witnesses but was told that they had gotten into a squabble with some soldiers and Military Police and had refused to leave and that one of them had *either yelled or had a sign* saying something to the effect that "Hitler's better than this" or "I like Hitler better"[4] (Appendix, p. 72).

The opinion below assumed the facts to be as has above been detailed (Appendix, p. 83). The Court below held:

> "We reach the conclusion that Article 474 is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of Article 474 as now worded, insofar as it may affect rights guaranteed under the First Amendment. However, it is the Order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements."

The University Committee, its friends and supporters, continue to desire to make known their protest against the war by "discussions, publications, demonstrations and non-violent direct action" (Appendix, pp. 7, 42-43, 49, 56, 60-61,

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[4] Affiant John E. Morby was carrying a sign which showed the following quote by Vice-Marshal Ky: "I have only one idol Hitler" (Appendix, p. 41). Other signs contained quotes from U Thant and General Shoup.

66). So long as the threat of enforcement of Article 474 of the Texas Penal Code exists, they are afraid and therefore unable to do so (*Id.*, at pages noted).

Summary of Argument

This case brings before the Court a challenge to the fundamental principle of primary federal responsibility for the enforcement of basic federal, constitutional rights. Appellants have challenged the jurisdiction of a federal district court called upon to protect such rights. The court below has simply held that a case or controversy has been brought before it for consideration. No final relief—of any kind—has been ordered below, thus the questions of the appropriateness of the remedy to be ordered, raised by appellants herein, are premature.

The existence of a case or controversy positing jurisdiction in the district court is undeniable under this Court's rulings in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965); *Zwickler* v. *Koota,* 389 U. S. 241 (1967); and *Epperson* v. *Arkansas,* 37 L. Wk. 4017 (November 12, 1968). The holding below, that the disturbing-the-peace statute of the State of Texas was overbroad, creating a chilling effect on First Amendment rights, was determined within the context of an existing controversy and was thus properly the subject of judicial review.

The prosecutions in this action were commenced under authority of a statute so overbroad and vague on its face that in controlling activity which may be regulated consistent with constitutional safeguards, it "sweep(s) unnecessarily broadly and thereby invade(s) the area of protected freedoms." *NAACP* v. *Alabama ex rel. Flowers,*

377 U. S. 288, 307 (1964); *Zwickler* v. *Koota*, 389 U. S. 241 (1967). Appellants' attempt to forestall any judicial consideration of this statute and its application by summarily dismissing the charges without in any respect disavowing the intent to prosecute under the statute in the future, does not abate the "chilling effect" upon appellees' exercise of First Amendment rights to which the initiation of prosecution gave rise. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Zwickler* v. *Koota, supra; Carmichael* v. *Allen*, 267 F. Supp. 985 (1967); *Harris* v. *Younger*, 281 F. Supp. 507 (1968). This Court is urged to consider the appellants' allegations of mootness and facial constitutionality in the context of the special reasons underlying exercise of federal jurisdiction.

POINT I

The federal District Court below had jurisdiction to hear and determine this matter.

A. *Appellees' complaint brought before the District Court below a case or controversy over which the court clearly had jurisdiction.*

At the center of appellants' position is the argument that the court below had no jurisdiction due to a lack of a case or controversy having been presented. This position totally misconceives this Court's view of the elements of a case or controversy in the First Amendment area. Only this Term, the Court has again explained its ruling in that regard in *Epperson* v. *Arkansas*, 37 L. Wk. 4017 (November 12, 1968). Presented with "at least a literal dilemma", the plaintiff in *Epperson* sought declaratory and injunctive relief against possible, but in no manner "threatened", future prosecutions which she feared would

result if she taught about evolution in the State's public high school. 37 L. Wk. at 4018. As this Court noted in regard to plaintiff's fear of prosecution, "There is no record of any prosecution in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in these States." 37 L. Wk. at 4018. As Justice Black, concurring, noted, the State indicated it would make no attempt to enforce the law; the teacher-plaintiff had discontinued teaching; the textbooks containing material on evolution were still being utilized and there was no evidence to show that the material contained was not being taught. 37 L. Wk. at 4021. Despite the highly attenuated nature of the controversy there presented, however, this Court considered the case on its merits. The instant matter, presenting a substantially more serious and immediate controversy, must therefore be considered ripe for judicial review.

In *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), this Court held that "the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purposes of discouraging protected activities." 380 U. S. at 489-90. This case brings before the Court a situation wherein the "first branch" of *Dombrowski* is challenged, to wit: a case wherein a statute is attacked on its face as abridging free expression.[5]

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[5] The court below specifically declined to reach the issue of unconstitutional application. It is submitted, however, that "the record is . . . totally devoid of support for the State's claim" that appellees spoke at all, much less loudly or vociferously, cf. *Cameron* v. *Johnson*, 390 U. S. 611 (1968), Statement of Facts, *supra*. The invocation of Article 474 in such circumstances is evidence of, at the very least, the State's total disregard for constitutional safeguards for regulation of speech, and, it is submitted, of an ever-present threat of future use of the statute to harass appellees in the exercise of First Amendment rights.

The scope of federal power to grant relief in such a case was explained in *Zwickler* v. *Koota*, 389 U. S. 241 (1967). In *Zwickler*, this Court held that ". . . a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute." "Escape" from the exercise of federal jurisdiction to grant declaratory relief is sanctioned ". . . only in narrowly limited 'special circumstances' *Propper* v. *Clark*, 337 U. S. 472, 492 (1948)." In sum, the appellees have attacked a state statute as overbroad, and vague, in violation of rights of free expression, and, absent special circumstances, appellees are entitled to declaratory relief.

It must be re-emphasized that no question is now properly raised as to the precise form of federal remedy which may be granted.[6] Rather the court below considered the issue of whether a case or controversy, positing federal jurisdiction had been presented.

> "Defendants contend that the case is now moot for the reason that 'no useful purpose could now be served by the granting of an injunction to prevent the prosecution of these suits because the same no longer exists'. *It appears, in other words, that defendants' motion to dismiss is addressed to that part of the plaintiffs' complaint which seeks an injunction against the prosecution of the criminal charges in Bell County.* We are clear that that part of plaintiffs' prayer is no longer

[6] The court below stayed its mandate pending corrective action by the State legislature. Subsequent to the issuance of the district court's order, the legislature met and took no action in regard to Texas Penal Code, Article 474.

before us. But we cannot fail to understand that, just as in *Dombrowski* v. *Pfister,* 380 U. S. 479, 483-492 (1965), and *Zwickler* v. *Koota,* 389 U. S. 241, 253-254 (1967), more is involved where the prayer for relief also requests a declaratory judgment that the statute under which the criminal charges were brought is unconstitutional on its face for being overly broad.

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With this background, how then do we evaluate the defendants' argument that inasmuch as the state charges have been dismissed, the record is bare, there is no 'case or controversy', there is nothing useful which can be accomplished. Of course, it ignores the reality that plaintiffs' prayer includes the request for a declaration that the statute is unconstitutional on its face. It ignores the notion, introduced in *Dombrowski* and reiterated in *Carmichael,*[1] that the statute's simple presence on the books (which is what the plaintiffs are attacking) may have the requisite 'chilling effect' on constitutionally protected behavior to warrant close judicial scrutiny. It even ignores that at least twice in the area of First Amendment rights, the United States Supreme Court has felt compelled to decide the constitutionality of state statutes where no state criminal charges thereunder were pending. We therefore overrule Defendants' Motion to Dismiss, and proceed to a consideration of the merits." Appendix, pp. 84-85, 88. (Emphasis added.)

The court below correctly pointed out that the absence of presently pending criminal charges does *not* defeat federal jurisdiction to grant at least declaratory relief where

[1] *Carmichael* v. *Allen,* 267 F. Supp. 985 (1967).

a chill on First Amendment activity persists due to the existence of the infirm statute on the books.[8]

The high-water mark of decisional law on this issue was reached in *Zwickler* v. *Koota*, 389 U. S. 241 (1967). The plaintiff in that action was tried and acquitted on state charges relating to distributing anonymous handbills which criticized a candidate for public office. Subsequent to his acquittal, he filed a federal action for declaratory and injunctive relief against future enforcement of the statute alleging "his intention and desire to distribute in the future . . . the anonymous leaflet he distributed in 1964." 261 F. Supp. 985 (1966). The plaintiff further alleged that as the prosecutor was a "'diligent and conscientious public officer'", 261 F. Supp. at 988, he would prosecute plaintiff for similar activities in the future. "He (the plaintiff) regards this presumption as 'the threat of prosecution' . . ." giving immediacy to his action. 261 F. Supp. at 988.

This Court, when the case was first before it for review, did not affirm the order of the district court in *Zwickler* dismissing the action. Despite the fact that plaintiff had

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[8] The court below found as follows:

"Is there then the requisite 'chilling effect' here? The sworn evidence in support of the plaintiffs' prayer for relief indicates that these men have ceased efforts to carry out the purposes and objectives of the University Committee for fear of sanctions under the statute which is presently attacked, that they have 'postponed further expression of (their) views through peaceful, non-violent activities lest (they) be arrested' for disturbing the peace. This in itself demonstrates a broad curtailment of activities which may include, and (as discussed in Point II) do include, protected behavior. Not only, as in *Carmichael, supra*, at 994, can the presence of this statute cause a person to 'pattern his speech with the ever present threat' of sanctions; here, it appears to have induced suspension of expression altogether" (Appendix, pp. 87-88).

been acquitted and absent *any* overt, affirmative threat by the prosecutor of future enforcement, this Court remanded the case for new proceedings below.

The court on remand in *Zwickler*, 290 F. Supp. 244 (1968), Docket No. 370, Jurisdiction Noted, October 15, 1968, ruled that the controversy was ripe where a statute that had not lapsed into desuetude, cf. *Poe* v. *Ullman*, 367 U. S. 497 (1961) had an inhibitory effect on First Amendment freedoms, 290 F. Supp. at 246-247. The court held that:

> "*When the action was initiated* the controversy was genuine, substantial and immediate.[9]
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> * * * * * *
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> Zwickler's complaint quite properly instances this seminal episode of harassment as illustrative of the impact upon him of an overbroad statute and as giving substance and immediacy to the threat of future inhibitory action. . . ." 290 F. Supp. 248, 249 (emphasis added).

The result in the instant case should flow, *a fortiori*, from this Court's decision in *Zwickler* given the critical factual differences between the matters set forth below:

i) The plaintiff was acquitted on the criminal charges in *Zwickler*. His conduct, if repeated, would most probably yield the same result or would not be actionable

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[9] Defendant in *Zwickler* attempted to moot the controversy by pointing out that the candidate criticized by Zwickler in the handbill had become a state judge so that the plaintiff's allegation that he desired to distribute in the future the leaflet he distributed in 1964, would be rendered null and void and of no effect. The district court refused to so find. 290 F. Supp. at 248.

at all. The plaintiffs in this action have no such assurance whatever. They were not given the opportunity of receiving any judicial hearing on their charges before those charges were dropped for reasons having nothing to do with the substance of the statute or their culpability or lack thereof.

ii) The "threat" of continued enforcement alleged in *Zwickler* was the bald assertion by plaintiff that the prosecutor, being "diligent and conscientious", would of course have to bring charges against plaintiff for future leafletting activity. 261 F. Supp. at 988. In the instant case, plaintiffs were threatened and harassed by the sheriff and his assistants (see Affidavits, Appendix, pp. 51-67), and were literally put in fear of future arrest to the extent that they have ceased all peaceful protest activity. See Opinion Below, Appendix, pp. 87-88.[10]

It is thus clear that the district court below was correct in ruling that the attempt of the State to moot the entire case must fail because this Court taught in *Zwickler* that

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[10] As the Court below noted, in *Carmichael* v. *Allen, supra*, the district court held that absent *specific disavowals* by the prosecutor of an intention to invoke the challenged statute in the future, equitable relief was both necessary and appropriate. 267 F. Supp. at 994. In another case in the Fifth Circuit, *Ware* v. *Nichols*, 266 F. Supp. 564 (1967), Circuit Judge Wisdom, concurring in the granting of declaratory relief also would have granted injunctive relief, stating, ". . . the fact that the State brought these *present* prosecutions, justifies an injunction against *future* prosecutions directed against the agents or persons similarly situated." 266 F. Supp. at 569. The criterion proposed by Circuit Judge Wisdom is rather like that in *Zwickler* wherein the initial arrest is viewed as a "seminal episode", 290 F. Supp. at 249, indicative of future intent.

the mere absence of pending criminal proceedings cannot in and of itself defeat federal jurisdiction. Particularly in this case, where the federal action was begun as soon as state charges were filed, where the state charges were dismissed for reasons having nothing to do with the culpability of appellees or the merits of the statute, and where intimidation by the State officials has caused appellees to suspend all peaceful protest activity, appellees are entitled to federal relief.

The decision of the court below was clearly in line with all, including the most recent, precedents of this Court. Appellees assert that the court below was further correct in suggesting that they are entitled to declaratory and injunctive relief in the absence of remedial legislative action. However, no specific relief has yet been granted. Thus at this time this Court is urged merely to affirm the decision of the court below as to its jurisdiction, and remand this matter for further proceedings consistent with the decision below.

B. *Upon remand, appellees will urge the court below to separately consider granting declaratory and injunctive relief to which appellees have been held to be entitled.*

Despite the prematurity of the argument, appellants seek to cast doubt upon the district court's statement that injunctive relief may be appropriate. At the outset, it is critical to note that the question of granting injunctive relief does not affect, as appellants have not truly challenged, the propriety of granting declaratory relief. *Zwickler* v. *Koota, supra.* Their argument relating to *Cameron* v. *Johnson,* 390 U. S. 611 (1968), must of necessity be

viewed as irrelevant to the question of whether declaratory relief is available when a statute limiting expression is held overbroad on its face. As appellees will demonstrate in Point II, *infra*, the court below was correct in holding Article 474 facially unconstitutional. The treatment by appellants of the need for injunctive relief against this facially unconstitutional statute, however, is wholly incorrect.

As noted at the outset, this case presents the first branch of *Dombrowski* for the Court's consideration. The statute herein has been held to be "impermissible and unconstitutionally broad". (Opinion Below, Appendix, p. 92.) As the district court below stated:

> "This case does not involve in any way an appraisal of the constitutionality of the application of the statute to the plaintiffs; we do not evaluate whether Article 474 was constitutionally applied to these plaintiffs' activities. Our sole concern is the determination of whether Article 474 on its face is, as plaintiffs argue, constitutionally defective as being overly broad" (Appendix, p. 89).

There is a critical difference between the two branches of *Dombrowski* as evidenced by this Court's ruling in *Cameron* v. *Johnson*, 390 U. S. 611 (1968). In *Cameron*, the Court considered the problem of allegedly harassing prosecutions undertaken pursuant to a statute *not* unconstitutional for overbreadth on its face. In so doing, the Court established certain criteria for determining whether arrests and prosecution were undertaken and pursued un-

der a valid statute for the purpose and with the effect of discouraging exercise of federal rights. Those criteria do not control this case.[11]

Appellants have confused the two branches of *Dombrowski* and its progeny. Appellants, at p. 11 of their Brief, state:

> "Absent threat of future arrest and absent a showing of a concerted plan to harass Appellees by state officers, Appellants urge that the instant case should be governed by the rationale and holding expressed by this court in *Cameron* v. *Johnson*, 390 U. S. 611 . . . "

The proposition relied upon by Appellants is taken from the opinion of Justice Fortas dissenting in *Cameron* and is noted as follows, also at p. 11 of Appellants' Brief:

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[11] Had the court below reached this issue, appellees submit that it would have found the statute unconstitutional as applied and invoked for purposes other than the good-faith administration of the criminal law. There is virtually no evidence to support the State's charges. Cf. 390 U. S. 611 (1967). This factor added to the intimidation of appellees which occurred at their arrests and the summary dismissal of the charges prior to hearing lend weight to the conclusion that further arrests of appellees under this statute for peaceful silent protest activity must be foreclosed.

There is further the astounding effort of the State, made on Motion for a New Trial to suggest that appellees were not charged with Article 474 at all. "Nowhere can the Court demonstrate that any charge was made that the plaintiffs or any of them used loud and vociferous language in any manner" (Appendix, p. 101). This attempt by the appellants, in bad faith, to escape proper judicial review, was met as follows in the court below: "In the Agreed Statement of Facts and Stipulations, filed with the official papers in this cause, Plaintiffs and Defendants agreed that the individual plaintiffs 'were charged with disturbing the peace in violation of Article 474' ". Issue having been joined on that question, and *no other* disturbing the peace statute appearing at all in the Texas Penal Code, the district court proceeded to label the State's unconscionable effort to forestall judicial consideration as "without merit" (Appendix, pp. 108-109).

> "I agree that the statute in question is not 'unconstitutional on its face'. But that conclusion is not the end of the matter. *Dombrowski* stands for the proposition that 'the abstention doctrine . . . is inappropriate for cases . . . where . . . statutes are justifiably attacked on their face as abridging free expression, or as *applied for the purpose of discouraging protected activities*.'" 380 U. S. at 489-490. (Emphasis added.)

Unhappily, appellants have emphasized precisely that portion of the *Dombrowski-Cameron* theory that is not at issue here. Appellees need not show "a course of conduct by Appellants . . . whereby any of Appellees . . . was . . . subjected to systematic enforcement of Article 474 to prohibit free expression" (Appellants' Brief, p. 10). Appellees have shown that they were arrested under a state statute overbroad on its face abridging free expression and that reasonable and well-founded fear of subsequent arrests under that statute has caused them to cease their exercise of First Amendment activity.

It is clear that appellees have presented a case or controversy within the meaning of the decisions of this Court, *Epperson* v. *Arkansas, supra; Zwickler* v. *Koota, supra; Dombrowski* v. *Pfister, supra;* and therefore that the court below had jurisdiction, and the motion to dismiss was properly denied. Appellees assert that the issuance of declaratory and injunctive relief will likewise be appropriate at an appropriate time, to wit, on remand to the court below.

Accordingly, it is urged that this Court affirm the decision below and remand this action for further proceedings in accord with the decision below. At that time, any questions as to the propriety of injunctive relief may be addressed to the three-judge court.

POINT II

Article 474 of the Texas Penal Code is unconstitutional on its face.

The Court below addressed its consideration on the merits solely to the question of the facial constitutionality of Article 474 and held ". . . . that Article 474 is impermissibly and unconstitutionally broad." Appendix, p. 92.[12] The Court below also held that ". . . it is our opinion that Article 474 must be added to the list of statutes which 'leave to the executive and judicial branches too wide a discretion in the application of the law.' It 'leaves wide open the standard of responsibility' relying on 'calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments per se.'. For this additional reason, Article 474 is vulnerable to constitutional attack." Appendix, p. 92. It is within the context of these pronouncements that appellees examine Texas Penal Code, Article 474.

A. *The double infirmities of overbreadth and vagueness are particularly problematic in disturbing the peace statutes.*

Article 474 is significantly different from many statutes at issue in earlier vagueness and overbreadth cases in that the two vices compound each other in this statute. Perhaps it is this rather unique nature of Article 474 that causes the State to confuse the concepts of vagueness and overbreadth and in its presentation in brief to discuss them

[12] As the court below stated, "Our inquiry deals with the overbreadth attack as it relates to the part of the statute which prohibits the use of 'loud and vociferous'. . . language . . . in a manner calculated to disturb the persons present.'" Appendix, p. 89.

almost interchangeably. Certainly the State errs in asserting that the opinion of the three-judge court "limited its concern to the determination of whether the statute was constitutionally defective on its face as being overly broad," Appellants' Brief, p. 13. For clearly the court struck down Article 474 on both counts: " . . . the statute on its face makes a crime out of what is protected First Amendment activity" (Appendix, p. 91), and " . . . Article 474 must be added to the list of statutes which 'leave to the executive and judicial branches too wide a discretion in the application of the law' " (Appendix, p. 92). In so doing the three-judge court was but following the guidelines set down by this Court.

In *Zwickler* v. *Koota,* 389 U. S. 241 (1967), the two concepts were succinctly stated and nicely delineated: "Overbreadth" means a regulation "offends the Constitutional principle that 'a governmental purpose to control and prevent activities subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms' "; "vagueness" includes that "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

From the inception of this action, appellees have contended that Article 474 is both overly broad and vague; Appendix, p. 18. They assert that it, therefore, is a sort of hybrid, coming within a variety of statutes which combines the two problems by employing imprecise terms to define the outer limits of regulations that may prohibit constitutionally protected activities.

When a statute seeks to cover a variety of activities in a single provision, there is a special danger of overbreadth —i.e. that at least some of the activities covered by the statute will be constitutionally protected. This is particularly true if the statute by its terms deals with speech. Such ambitious legislative undertakings must be drafted with the highest precision—a standard of exactness significantly higher than that required in vagueness cases in which the element of overbreadth is not present. Furthermore, if the enforcement context of the statute is likely to be emotionally charged, the need for precision is even greater.

The three-judge court below was correct in its opinion that Article 474 must be judged against the very highest standards of draftsmanship. For this statute presents a rare congruence of four key elements: 1) It is multi-purpose in that it attempts to cover a wide variety of activities with a single generalized definition; 2) By its terms it is aimed directly at speech, not at conduct which may incidentally involve speech; 3) By its terms it is to be applied in emotionally charged situations; and 4) Its key operative words such as "loud", "calculated", and "disturb" are of the lowest grade of certainty. See E. Greund, "The Use of Indefinite Terms in Statutes", 30 Yale L. J. 437 (1921).

B. *Under standards by which this Court has previously tested breach of the peace regulations, Article 474 is unconstitutionally broad and vague.*

Article 474 purports to inhibit certain conduct which is "calculated to disturb." There is no higher standard of intent such as was found in *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) where language was punishable if "calcu-

lated or likely to provoke another person or persons to acts of immediate violence." Cf. *State* v. *Cantwell,* 126 Conn. 1, 8 A. 2d 533 (1939). Nor does Article 474 contain the standard reviewed in *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) where "any act or conduct inciting to violence," 123 S. E. 2d at 249, was made punishable. Yet this Court struck down the offenses as defined in *Cantwell* v. *Connecticut* and *Edwards* v. *South Carolina.* It must then, appellees urge, *a fortiori,* strike down Article 474 of the Texas Penal Code.

The "disturbance" which the Texas statute seeks to avoid is in fact that conduct which may be precisely the subject for First Amendment protection. As the Court below noted, citing *Terminiello* v. *City of Chicago,* 337 U. S. 1, 4 (1949):

> "A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Appendix, p. 90.

Where a statute sweeps unnecessarily broadly and therefore invades the area of protected freedoms as does Article 474, then that statute must be declared unconstitutional on its face. *Zwickler* v. *Koota,* 389 U. S. at 250, *Dombrowski* v. *Pfister, supra, NAACP* v. *Alabama, supra.*

Discretion in enforcement too wide to admit of safe, constitutional strictures was also reviewed by this Court in the context of disturbing the peace prohibitions in *Cantwell* v. *Connecticut,* 310 U. S. at 308, and in *Ashton* v. *Kentucky,* 384 U. S. 195 (1966). *Ashton* represents this Court's most recent discussion of a breach of the peace

regulation and is a dramatic reaffirmation of the unique constitutional difficulties inherent in the concept of such statutes. The holding therein is dispositive.

In *Ashton* the defendant was convicted on a common law crime defined by the trial judge as publishing "any writing calculated to create disturbances of the peace." This Court's opinion on appeal could easily have been written with Article 474 in mind:

> "To make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se.*"

The Court below so held in this case, and this Court is urged to affirm that ruling.

In summary, the cases in which this Court has viewed breach of the peace regulations on their face reveal a consistent pattern. Just as the functional reasons for the vagueness and overbreadth doctrines would indicate, the cases reaffirm that there *is* something unique about breach of the peace regulations. A holding that Article 474 is overbroad and vague would involve no doctrinal step beyond those which have already been taken; such a holding would not require an invalidation of the whole breach of the peace concept. For Article 474 is one of the broadest breach of the peace regulations to come before this Court. Cf. *Cantwell* v. *Connecticut, supra, Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942), *Terminiello* v. *City of Chicago, supra,*

Edwards v. *South Carolina, supra, Cox* v. *Louisiana,* 379 U. S. 536 (1965) and *Ashton* v. *Kentucky, supra.*[13]

C. *State court decisions, considered by the Court below, do not sufficiently circumscribe the scope of Article 474 so as to save it from the dual infirmities of overbreadth and vagueness.*

Perhaps the best statement of the State's attitude toward Article 474 is contained in *Ex parte Slawson,* 141 S. W. 2d 609 (Ct. Crim. App. 1940). In response to an allegation that Article 474 is overbroad and vague, the Court of Criminal Appeals upheld the statute without making the slightest attempt to limit its terms:

> "This statute has been in existence for over half of a century and many prosecutions and convictions thereunder have been sustained, and we see no good reason to strike it down, *even if some feature thereof might be held to be uncertain.* There are many acts denounced in said article as a violation of law and good order which are sufficiently certain and definite to make it a good and wholesome statute." (Emphasis added.)

The nebulous term "disturb" need not even be clarified in the charge to the jury:

> "It is unquestionably correct for the court to charge the jury that, if any portion of the people assembled on the occasion referred to were disturbed, it would be a disturbance, within the contemplation of the statute."
>
> *Young* v. *State,* 44 S. W. 507 (1898).

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[13] In none of these previous cases was evidence of deterrence caused by the overbreadth of the statute so clear as on this record. Appendix, pp. 42, 43, 49, 61, 66.

Unlike the Courts in other states,[14] the Texas Courts have made no attempt to narrow the scope of Article 474. *Ex parte Slawson, supra; Woods* v. *State,* 213 S. W. 2d 685, 687; *Head* v. *State,* 96 S. W. 2d 981, 983; *Young* v. *State,* 44 S. W. 507; *Ex parte Trafton,* 271 S. W. 2d 814, 816-817. Confining the offense to "loud and vociferous" sounds (which the statute does not even do; it also prohibits *inter alia* "indecent language") is not an operative narrowing at all, for this Court has made it clear that demonstrations may not be prohibited solely because they are loud. *Edwards* v. *South Carolina, supra* ("singing," "clapping," "stomping of feet"); *Cox* v. *Louisiana, supra* ("loud cheering and spontaneous clapping and screaming and a great hullabaloo").

The court below quite clearly considered the State court rulings on this statute in reaching its determination on the merits. Appendix, pp. 110-113 ("loud and vociferous"), pp. 114-115 ("calculated to disturb"). The three-judge court correctly concluded that "Texas has an overbroad definition of the offense when applied to activities fairly within First Amendment protection," Appendix, p. 112, and that "the quantum of disturbance necessary for violation sweeps within its broad scope conduct protected by the First Amendment," Appendix, p. 115. These conclusions are based on a determination that "the key to understanding the Texas statute is not the meaning of loud and vociferous but the effect, in terms of quantum of disturbance, that the speech had on others." Appendix, p. 115.

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[14] *State* v. *Cantwell,* 126 Conn. 1, 8 A. 2d 333 (1939); *State* v. *Chaplinsky,* 91 N. H. 310, 18 A. 2d 754 (1941); *State* v. *Edwards,* 239 S. C. 339, 123 S. E. 2d 247 (1961); *State* v. *Cox,* 244 La. 1087, 156 So. 2d 448 (1963); *State* v. *Givens,* 28 Wis. 2d 109, 135 N. W. 2d 780 (1965).

The court below, having amply considered state court rulings on Article 474, and those rulings having in no way rehabilitated the statute, properly held it to be overbroad and vague on its face. This court is urged to affirm the holding of the court below.

D. *Appellants have attempted unsuccessfully to rehabilitate Article 474.*

Appellants have attempted to narrow the scope of the statute's proscription as follows:

> "Defendants [appellants] urge that the opinion of the Court [District Court] is contrary to the law and the facts wherein the Court has held that the provision regarding the use of loud and vociferous language would on its face prohibit speech which would stir the public to anger, would invite dispute, would bring about a condition of unrest, or would create a disturbance. Article 474 only prohibits such language when used at specified times and places. The Court goes on to point out that 'Article 474 prohibits the use of "loud and vociferous language . . . *in a manner calculated to disturb*" the public.' This is erroneous in that Article 474 only prohibits a person from acting in this manner when he goes to a certain place and uses such loud and vociferous language to disturb the persons gathered there. This is vastly different from a statute which simply makes a shotgun prohibition against language which might stir up the public." Appellants' Motion for New Trial, Appendix, p. 102.

The "certain place" to which appellants advert, the element which appellants rely upon as the critical narrowing

factor herein is ". . . into or near any public place, or into or near any private house . . ." It is difficult to imagine many, if any, places which are not encompassed within this formulation. To suggest this as the limiting factor of this statute is merely to emphasize that which is the cause of its infirmity.

Appellants expose the true heart of their argument in setting forth the "legitimate governmental interest" justifying the regulation of expressional activity. Again quoting from the Defendants' Motion for New Trial in the court below:

> "Defendants urge that the Court erred in its opinion by failing to observe as a canon of construction the Preamble to the Constitution of the United States which says, *inter alia*:
>
> > 'We the People of the United States, in Order to . . . insure domestic Tranquility . . . do Ordain and establish this Constitution for the United States of America.'
>
> Defendants urge strongly that any construction of the Texas Disturbing the Peace Statutes must be undertaken with full recognition of the foregoing constitutional provision." Appendix, p. 103.

The court below answered appellants by stating that although Texas clearly has the power to regulate demonstrations, "the power to regulate must be so exercised as not, in attaining a permissible end, to unduly infringe a protected freedom." *Shelton* v. *Tucker,* 364 U. S. 479 (1960). Appendix, pp. 89, 109. Appellants' suggested alternative test of facial constitutionality, to wit, that a

". . . statute is valid, even though its terms are general and imprecise, if its application is not dependent on the content of the speech", Brief for Appellants, p. 13, simply does not meet the strictures laid down by this Court. *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Baggett* v. *Bullett,* 377 U. S. 360 (1964); *Zwickler* v. *Koota, supra; Dombrowski* v. *Pfister, supra.*

Appellants suggest that the instant statute should be upheld as consistent with this Court's ruling in *Feiner* v. *New York,* 340 U. S. 315 (1951). Brief for Appellants, p. 16. But *Feiner* did not discuss the issue of the statute's overbreadth for neither at the trial nor before this Court did petitioner ever raise the issue; see Brief for Petitioner, *Feiner* v. *New York,* pp. 6-7, Statement of Issues Raised, Transcript of Record. *Feiner* is simply not an overbreadth precedent, as this Court recognized in *Edwards* v. *South Carolina,* 372 U. S. at 236, and *Cox* v. *Louisiana,* 379 U. S. at 551. The case stands only for the proposition that punishment was held to be permissible in a situation where a speaker refuses repeated requests by police officers to desist because a crowd is blocking sidewalks, becoming unruly and generally presenting a clear danger of disorder.

Appellants also cited this Court's *per curiam* opinion in *Zwicker* v. *Boll,* 391 U. S. 353 (1968). It is clear that *Zwicker* is not a holding on the merits of the Wisconsin disorderly conduct statute but rather is an affirmance of the decision below, 270 F. Supp. 131, which went off on a procedural issue. Only one judge in the *Zwicker* district court stated that the statute was facially valid while an-

other expressly left the issue undecided and a third did not reach the question at all.[15]

This case is unique in its factual setting and in the application of an archaic regulation to the facts presented. In this context, the Court is urged to uphold the right of peaceful, free expression in the face of repressive use of a generalized concept of disturbing the peace, which today's demands suggest is obsolete. For as the court below—a court composed of three experienced judges who are long time residents of the Central Texas area—foresightedly determined (Appendix, p. 111):

> ". . . we have considered the nature of the demonstrations that pervade our society today. The nature of the protest movements has convinced us that while the Texas definitions may suffice for non-first amendment situations, they are inappropriate in the free-speech arena. The modern demonstration involves hundreds of thousands of citizens marching along highways, picketing public accommodations or schools, or conducting mass meetings in parks or other public buildings. Although these projects create problems, the decisions clearly hold that the peaceful expression of views by demonstrations, marches and assemblies are within the ambit of the First Amendment."

In this light it will not do to say, as Appellants suggest, Appellants' Brief, p. 22, that because the Court of Crim-

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[15] It is noteworthy that a major reason for the three-judge court's abstention in *Zwicker*, to wit, the possibility of obtaining state declaratory relief is here unavailable. In Texas, declaratory and injunctive relief against an unconstitutional statute is not available unless "its enforcement invades a vested property right." *Kent Hotel Operating Co.* v. *Wichita Falls*, 141 Tex. 90, 170 S. W. 2d 217, 219 (1943); *Flowers* v. *Woodruff*, 200 S. W. 2d 178 (1947).

inal Appeals of Texas has limited conviction for use of "loud and vociferous language" to conduct "which creates so great an amount of noise that it was calculated to disturb the peace and tranquility of . . . persons in a public place" that the statute is not unconstitutional. Today's demonstrations and protests are on occasions conducted loudly and vociferously but properly do not lose the protection of the First Amendment "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *City of Chicago, supra,* 337 U. S. at 4. No such showing was made here as it cannot be made. This Court is, therefore, urged to affirm the decision of the court below.

POINT III

There is no procedural defect within the terms and intent of 28 U. S. C. §2284 which divested the Court below of jurisdiction.

Contrary to appellants' assertion and the authorities they cite to support it, the provisions of 28 U. S. C. §2284 are *not* jurisdictional, but procedural, *Van Buskirk* v. *Wilkinson,* 216 F. 2d 735, 737 (9 Cir. 1954); *Lion Manufacturing Co.* v. *Kennedy,* 330 F. 2d 833, 840 (D. C. Cir., 1964); see *Ex parte Poresky,* 290 U. S. 30, 54 S. Ct. 3, 78 L. Ed. 132 (1933); see also *National Council, etc.* v. *Caplin,* 224 F. Supp. 313, 314 (D. C., 1963).

The two earlier decisions relied upon by appellants are inapposite. See Defendants' Motion for New Trial, Appendix, pp. 94 *et seq. Crescent Manufacturing Company* actually ruled upon another point and the material quoted

therefrom at page 2 of Defendants' Motion for a New Trial is pure dictum. *Arneson* v. *Denny* decided only that an application for an interlocutory injunction would be dismissed because the court felt that the notice that was given was insufficient; however, this finding did not prevent the court from finally deciding the case in a separate opinion reported at 25 F. 2d 988.

It is significant, we think, that in each of these cases the claimed defect in procedural steps was called to the courts' attention prior to decision. Had the oversight in the instant case been raised by appellants before hearing, appropriate steps could have been taken by the Clerk of the Court to give the notice. Failure to raise the point constitutes, we submit, waiver.

Moreover, failure to give special formal notice has in no way harmed appellants and the purpose of the §2284 provision has clearly been served. *Consolidated Freight Lines* v. *Pfost,* 7 F. Supp. 629, 630 (D. C. Idaho, 1934) points out that the purpose of the statutory provisions then in effect is "so that the state's interest may be protected . . .". Clearly the vigorous representation of the appellants herein by the Attorney General was designed to protect that interest. The Attorney General of Texas is the lawyer not only for the State of Texas as a political entity but also for the Governor, Article IV, Section 22, Constitution of the State of Texas; Article 4399, V. A. C. S. Under these circumstances, it is difficult to see what additional purpose or function could be served by giving notice directly to the Governor.

If, however, the Court should determine that compliance with the notice provision is jurisdictional, contrary to the authorities and argument presented above, we suggest that it would be appropriate to withdraw the opinion heretofore

rendered, direct the Clerk of the Court to give the notice and, if the Attorney General insists on its, hold another hearing and then reissue the opinion.

CONCLUSION

The core of appellants' argument, simply stated, is that with the dismissal of the State criminal charges initially filed against appellees, the appellants instantly divested the federal court of jurisdiction over appellees' complaint for injunctive and declaratory relief. As the court below correctly noted, dismissal of the pending criminal charges mooted that portion of the action seeking injunctive relief against those prosecutions but was in no way directed toward or effective as regards the requests for declaratory and injunctive relief against future prosecutions. That decision was consonant with this Court's most recent cases concerning the scope of federal power in an action wherein facial unconstitutionality of a statute with resulting chilling effect on expression is alleged.

The court below stayed its mandate pending possible remedial state legislation. Such legislation not having been passed, the case should be remanded to court below for further proceedings consistent with that court's prior opinion.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 7

LESTER GUNN, ET AL.,

Appellants

v.

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, ET AL.,

Appellees

On Direct Appeal from the United States District Court
Western District of Texas
Waco Division

APPELLANTS' SUPPLEMENTAL BRIEF ON REARGUMENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

At the initial argument of this case in January the Court questioned counsel for both sides as to whether the order of the three-judge court had sufficient finality to be reviewable here. That issue was not discussed in the briefs on the original submission of this case and Appellants are filing this Supplemental Brief in order to discuss the issue.

The opinion below concluded with the paragraph:

> "We reach the conclusion that Article 474 is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory

judgment to that effect, and to injunctive relief against the enforcement of Article 474 as now worded, insofar as it may affect rights guaranteed under the First Amendment. However, it is the order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements."

It will be noted that the Court stayed its mandate and retained jurisdiction of the cause pending "the next session, special or general, of the Texas legislature . . ."

The order referred to is dated April 9, 1968 and entered April 10, 1968. (A.2). The Legislature of Texas convened in special session June 4, 1968 and adjourned on July 3, 1968 without taking any action on Article 474, Texas Penal Code.[1]

Therefore the above mentioned reservation of jurisdiction was exhausted by July 3, 1968.

It may be that the Court's concern during the argument in January was because there was no separate document labeled "judgment" as required by Rule 58, Federal Rules of Civil Procedure. It is clear that the Court below thought that it was entering a judgment as reflected by its docket entry of April 10, 1968 (A.2). It is important to note however that appealability here is governed solely by Title 28, Section 1253, of the

[1]The Legislature met in general session January 14, 1969 and before adjournment passed an amendment to Article 474, Texas Penal Code, which was affective June 12, 1969. The 1969 amendment had no relation to the conditional stay of mandate and in Appellants' view it has no bearing on the present case. For the information of the Court, however, its text is set out as an appendix to this brief at page 9.

United States Code. Neither Rules 73-76 of the Federal Rules of Civil Procedure, in effect when notice of appeal was given in this case, nor the Federal Rules of Appellate Procedure now in effect, nor the 1967 Revised Rules of this Court undertake to govern in any relevant way direct appeals from a statutory three-judge court to this Court.

The statute that does govern these appeals, 28 U.S.C. § 1253, allows appeal to this Court "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction . . ." Even if it be conceded *arguendo* that the order entered in the court below was not a "judgment" and even if it be conceded *arguendo* that it was not "final," there can be no doubt that it was an "order" granting an interlocutory injunction and it therefore comes squarely within the provisions of the statute.[2]

The distinction between a "judgment" and an "order" is made even clearer by 28 U.S.C. § 2101(b) requiring that direct appeal to this Court must be taken within thirty days "from the judgment, order or decree, appealed from, if interlocutory . . ."[3]

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[2]The full text of Section 1253, Title 28 U.S.C., is as follows:
"§ 1253. Direct appeals from decisions of three-judge courts
Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c.646, 62 Stat. 928."

[3]The full text of 28 U.S.C., Title 2101 (a) and (b) [(c)-(f) omitted] is as follows:
"§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay
(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the

Thus the Congress in regulating appeals from three-judge courts to this Court has clearly recognized that an "order" is appealable even though it may not be a "judgment."

Even when the jurisdiction of this Court is limited by statute to a "final judgment," the Court has taken a "pragmatic approach" in order to achieve the "just, speedy, and inexpensive determination of every action." *Brown Shoe Co. v. United States,* 370 U.S. 294, 306 (1962). A similar pragmatic approach is even more clearly indicated where, as here, the only question is the degree of formality with which the court below has evidenced its order. See also *Crosby v. Pacific S.S. Lines, Ltd.,* 135 F.2d 470, 473-474 (9th Cir. 1943), and *Hamilton v. Stilwell Van and Storage Co.,* 343 F.2d 453 (3rd Cir. 1965).

Respectfully submitted,

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entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

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CERTIFICATE OF SERVICE

I, Howard M. Fender, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Appellants' Supplemental Brief on Reargument has been served on counsel for the Appellees by depositing same in the United States Mail, postage prepaid, addressed to Mr. Sam Houston Clinton, Jr., 308 West 11th, Austin, Texas 78701, this the_____day of_____, 1969.

HOWARD M. FENDER
Assistant Attorney General

CRIMES-DISORDERLY CONDUCT

CHAPTER 454

H.B. NO. 57

. . . . .

Be it enacted by the Legislature of the State of Texas:

Section 1. Article 474, Penal Code of Texas, 1925, as amended by Section 1, Chapter 10, Acts of the 51st Legislature, 1st Called Session, 1950, is amended to read as follows:

"Section 1. No person, acting alone or in concert with others, may engage in disorderly conduct. Disorderly conduct consists of any of the following:

"(1) behavior of a boisterous and tumultuous character in a residential area or a public place such that there is a clear and present danger of alarming persons where no legitimate reason for alarm exists; or

"(2) interfering with the peaceful and lawful conduct of persons in or about their homes or public places under circumstances in which such conduct tends to cause or provoke a disturbance; or

"(3) violent and forceful behavior at any time in or near a public place, such that there is a clear and present danger that free movement of other persons will be arrested or restrained, or other persons will be incapacitated in the lawful exercise of business or amusement; or

"(4) behavior involving personal abuse or assault when such behavior creates a clear and present danger of causing assaults or affrays; or

"(5) in a public or private place engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under

circumstances in which such conduct tends to cause or provoke a disturbance; or

"(6) wilful and malicious behavior that interrupts the speaker of any lawful assembly or impairs the lawful right of others to participate effectively in such assembly or meeting when such conduct tends to cause or provoke a disturbance; or

"(7) behavior near a courthouse or other public building wherein judicial proceedings are being held, designed or having the effect of interfering with the administration of justice, whether by disrupting the courts or by intimidating the judges, witnesses, jurors, or other persons having business with the courts; or

"(8) behavior near any public building wherein matters affecting the public are being considered or deliberated, designed or having the effect of interfering with such proceedings under circumstances in which such conduct tends to cause or provoke a disturbance; or

"(9) wilful and malicious behavior which obstructs or causes the obstruction of any doorway, hall, or any other passageway in a public building to such an extent that the employees, officers, and other persons, including visitors and tourists, having business with the government are denied entrance into, exit from, or free passage in such building; or

"(10) behavior involving the display of any deadly weapon in a public place in such a manner as to alarm or frighten other persons present; or

"(11) enters upon the property of another and for a lewd or unlawful purpose deliberately looks into a dwelling on the property through any window or other opening in it.

"Sec. 2. Any person who violates any of the provisions of Section 1 of this Article shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than Two Hundred Dollars ($200). For any second or subsequent conviction of any of the provisions of Section 1 of this Article such person shall be punished by a fine of not less than One Hundred Dollars ($100) nor more than One Thousand Dollars ($1,000), or by imprisonment in the county jail for not more than thirty (30) days or by both such fine and imprisonment."

Sec. 2. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each house be suspended, and this Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

. . . . .